TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 76

THE FEDERAL LAND BANK OF SAINT PAUL,
PETITIONER

vs.

BISMARCK LUMBER COMPANY AND JOHN GRAY, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

PETITION FOR CERTIORARI FILED MAY 9, 1941
CERTIORARI GRANTED MAY 26, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. —

THE FEDERAL LAND BANK OF SAINT PAUL, PETITIONER

vs.

BISMARCK LUMBER COMPANY AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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1 In District Court, Fourth Judicial District, County of Burleigh

THE FEDERAL LAND BANK OF SAINT PAUL, A BODY CORPORATE, PLAINTIFF

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS

Summons

The State of North Dakota to the above named Defendants:

You are hereby summoned to answer the Complaint in the above entitled action, which will be filed in the office of the Clerk of the District Court in and for the County of Burleigh, State of North Dakota, a copy of which is hereto annexed and herewith served upon you and to serve a copy of your answer upon the subscriber within thirty days after the service of this Summons upon you, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated this 9th day of March A. D. 1938, at Bismarck, North Dakota.

GEO. F. SHAFER,
Attorney for the Plaintiff,
Office and Post Office Address,
Bismarck, North Dakota.

JOHN THORPE,
Attorney for the Plaintiff,
Office and Post Office Address,
346 Jackson Street, St. Paul, Minnesota.

ROBERT J. BARRY,
Of Counsel,
Office and Post Office Address,
346 Jackson Street, St. Paul, Minnesota.

2 In District Court, Fourth Judicial District, County of Burleigh

THE FEDERAL LAND BANK OF SAINT PAUL, A BODY CORPORATE, PLAINTIFF

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS

Complaint

Comes now the Plaintiff herein, and for its cause of action against the Defendants, alleges and shows to the Court:

I

That the Plaintiff is a body corporate, duly organized, chartered, and existing under the Act of Congress approved July 17, 1916, and acts amendatory thereof, known and cited as the "Federal Farm Loan Act." That said Bank is thereunder duly authorized and empowered to do business in the States of North Dakota, Minnesota, Wisconsin, and Michigan, the same constituting and comprising the Seventh Farm Credit District, and is further authorized and empowered, when designated for that purpose by the Secretary of the Treasury, to act as depositary of public moneys and as fiscal agent of the Federal Government. That its office and principal place of business is in the City of St. Paul and State of Minnesota.

II

That pursuant to the terms of said Federal Farm Loan Act, as amended, which created a system of banks and corporations to carry out a policy of the Federal Government announced therein, said bank is engaged in the extension of credit to farmers to be availed of in the furtherance of agricultural undertakings, such loans being made on the security of qualified first mortgages on farm lands situated in the States of its said district; receiving and collecting payments thereon; handling and disposing
3 of securities and properties acquired by it in carrying on its said operations; and generally in performing such services and functions as are necessary and incident to the conduct of its said business.

III

That in the conduct of its business in the State of North Dakota, The Federal Land Bank of Saint Paul has acquired and now owns a number of farm properties located in North Dakota, including three certain farm properties, together with the buildings located thereon, situated in Burleigh County, North Dakota, known as the Henry Apland farm, Henry V. Johnson farm, and Albert Kupkufski farm, respectively; that in connection with the ownership, maintenance, and preservation of said farm properties, it has been, and will be in the future, necessary for The Federal Land Bank to purchase at retail, from time to time, from retail dealers within North Dakota, large quantities of goods, wares, and merchandise for its use in repairing, maintaining, and improving the buildings and fences located on said farm properties.

IV

That the Defendant, Bismarck Lumber Company, is a corporation, duly organized and existing under the corporation laws of the State of North Dakota, with its place of business located at Bismarck, North Dakota; that the said Bismarck Lumber Company was, during all of the times herein alleged, duly authorized to engage in and transact business as a retailer under the provisions of Chapter 249, Session Laws of North Dakota, for 1937, and was engaged in the business of selling building materials at retail at its place of business located at Bismarck, North Dakota.

V

That the Defendant, Owen T. Owen, is now and has been since the month of January 1937, the duly appointed, qualified, and acting Tax Commissioner of the State of North Dakota; that the said Defendant Owen T. Owen, as Tax Commissioner of the State of North Dakota, was during all of the times herein alleged,
4 and is now, charged with the administration of Chapter 249 Session Laws of North Dakota for 1937, known as the State Sales Tax Act, and with the collection of all taxes due the State of North Dakota thereunder.

VI

That pursuant to the provisions of Chapter 249, Session Laws of North Dakota for 1937, entitled:

"An Act to Equalize Taxation and Replace in Part the Tax

on Property; To Provide the Public Revenue to be Used for Such Replacement by Imposing a Tax on the Gross Receipts from Retail Sales as Defined herein; To Provide for the Collection of Such Tax, the Distribution and Use of the Revenue Derived Therefrom, and the Administration of Said Law; To Provide for Certain Deductions and Exemptions; Establishing a Lien for the Payment for such Tax; To Fix Fines and Penalties for the Violation of the Provisions of this Act; To Repeal All Laws or Parts of Laws in Conflict herewith and Declaring an Emergency."

it is the duty of the said State Tax Commissioner to require every retail dealer subject to the provisions of said Act, to pay a tax of two per cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in the Act, sold at retail in the State of North Dakota to consumers or users, and to require every retailer subject to the Act, to file a quarterly return in such form and manner as may be prescribed by the State Tax Commissioner, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the State Tax Commissioner may require.

VII

That heretofore and during the months of October and November 1937, the Plaintiff purchased at retail from the Defendant, Bismarck Lumber Company, and the said Defendant sold and delivered to the Plaintiff at Bismarck, North Dakota, certain goods, wares, and merchandise as follows, to wit:

(1) That on October 28, 1937, the Plaintiff purchased and received from the Defendant, Bismarck Lumber Company, and the said Bismarck Lumber Company sold and delivered to the Plaintiff at Bismarck, North Dakota, for use in repairing, maintaining, and improving the buildings located on one of its farm properties situated in Burleigh County, North Dakota, known as the Henry Apland farm, certain building materials, consisting of lumber, cement, glass, plaster, nails, and other like articles of merchandise; that the agreed purchase price for said personal property, so sold and delivered was the sum of $190.60, exclusive of any state sales tax; that thereafter and prior to the commencement of this action, the said Defendant, Bismarck Lumber Company, demanded of the Plaintiff the payment of the sum of $194.41, including a state sales tax in the amount of $3.81, as the purchase price due it for the merchandise

sold and delivered as aforesaid; but that the Plaintiff has refused to pay the said state sales tax, or any part thereof.

(2) That between November 1st and November 12th, 1937, the Plaintiff purchased and received from the Defendant, Bismarck Lumber Company, and the said Bismarck Lumber Company sold and delivered to the Plaintiff at Bismarck, North Dakota, for use in repairing, maintaining, and improving the buildings located on one of its farm properties situated in Burleigh County, North Dakota, known as the Henry V. Johnson farm, certain building material, consisting of lumber; that the agreed purchase price of said lumber so sold and delivered was the sum of $16.65, exclusive of any state sales tax; that thereafter and prior to the commencement of this action, the said defendant, Bismarck Lumber Company, demanded of the Plaintiff the payment of the sum of $16.98, including a state sales tax in the amount of 33c, as the purchase price due it for the merchandise sold and delivered as aforesaid; but that the Plaintiff has refused to pay the said state sales tax, or any part thereof.

(3) That between November 1st and November 12th, 1937, the Plaintiff purchased and received from the Defendant, Bismarck Lumber Company, and the Bismarck Lumber Company sold and delivered to the Plaintiff at Bismarck, North Dakota, for use in repairing, maintaining, and improving the buildings located on one of its farm properties situated in Burleigh County, North Dakota, known as the Henry V. Johnson farm, certain building materials, consisting of lumber, shingles, sash, nails, ridge roll paper, and other like articles of merchandise; that the agreed purchase price of said personal property so sold and delivered was the sum of $149.69, exclusive of any state sales tax; that thereafter and prior to the commencement of this action, the said Defendant, Bismarck Lumber Company, demanded of the Plaintiff the payment of the sum of $152.51, including a state sales tax in the amount of $2.82, as the purchase price due it for the merchandise sold and delivered as aforesaid; but that the Plaintiff has refused to pay the said state sales tax, or any part thereof.

(4) That on November 6th, 1937, the Plaintiff purchased and received from the Defendant, Bismarck Lumber Company, and the said Bismarck Lumber Company sold and delivered to the Plaintiff at Bismarck, North Dakota, for use in repairing, maintaining, and improving the buildings located on one of its farm properties situated in Burleigh County, North Dakota, known as the Albert Kupkufski farm, certain building materials, consisting of lumber, cement, plaster, brick, shingles, kalsomine,

paint, nails, and other like articles of merchandise; that the agreed purchase price for said personal property so sold and delivered was the sum of $51.32, exclusive of any state sales tax; that thereafter and prior to the commencement of this action, the said Defendant, Bismarck Lumber Company, demanded of the Plaintiff the payment of the sum of $52.38, including a state sales tax in the amount of $1.06, as the purchase price due it for the merchandise sold and delivered as aforesaid; but that the Plaintiff has refused to pay the said state sales tax, or any part thereof.

VIII

That this action is brought under Sections 7712A1 to 7712A16, Supplement to the Compiled Laws of North Dakota for 1913, for the purpose of declaration and adjudication by the Court of the rights, status, liability, and other legal relations of the parties to this action under:

7 (1) Chapter 249 Session Laws of North Dakota for 1937, known as the State Sales Tax Act.

(2) Federal Farm Loan Act, particularly Section 26 thereof, and Acts Amendatory thereof.

(3) Constitution of the United States.

IX

That an actual controversy exists between the Plaintiff herein, on the one side, and the Defendants Bismarck Lumber Company, a Corporation, and Owen T. Owen, as Tax Commissioner of the State of North Dakota, on the other side, as to their respective rights, status, liability, and other legal relations arising out of said personal property sale transaction, and the laws applicable thereto, and particularly in respect to the legal interpretation and construction of the following State and Federal statutory provisions, to wit:

(1) Sections 2, 3, 6, 7, and Subsection 2 of Section 10 of Chapter 249 Session Laws of North Dakota for 1937, or portions thereof, as follows:

"SEC. 2. Tax Imposed.—There is hereby imposed, beginning the first day of May 1937, and ending June 30th, 1939, a tax of two percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users;"

* * * * *

"SEC. 3. Exemptions.—There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

"(A) The gross receipts from sales of tangible personal property which this state is prohibited fro mtaxing under the constitution or laws of the United States or under the constitution of this state."

* * * * *

"SEC. 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such tax shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts." * * *

"SEC. 7. Unlawful Acts.—It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly, or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded."

* * * * *

"SEC. 10. Payment of Tax—Bond—Creation of Lien.—

* * * * *

2. Every retailer, at the time of making the return required hereunder, shall compute and pay to the Commissioner the tax due for the preceding period."

* * * * *

(2) Section 26, Federal Farm Loan Act (U. S. C. Title 12, Sections 931 and 933) as amended, as follows:

"Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of Sections 761 and 781 of thi Chapter. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this chapter, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation."

* * * * *

"Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

(3) Constitution of the United States.

X

That the Plaintiff claims and alleges that it is not liable for the payment of any state sales tax on account of said personal property sale transactions, for the following legal reasons:

(1) That the Plaintiff is specifically exempted from the payment of any state sales tax under the provisions of Section 26 of the Federal Farm Loan Act and the provisions of Subsection (A), Section 3 of the State Sales Tax Act, Chapter 249, Session Laws of North Dakota for 1937.

(2) That the Federal Land Bank of Saint Paul, being an instrumentality of the United States, is not liable for the
9 payment of any state sales tax without the express consent of Congress, and that such consent has not been given.

(3) That Chapter 249, Session Laws of North Dakota for 1937, insofar as the same purports to impose a state sales tax on goods, wares, or merchandise purchased by The Federal Land Bank of Saint Paul for its use in the transaction of its business; and insofar as said statute purports to direct, authorize, and empower each retailer who sells goods, wares, or merchandise, to The Federal Land Bank of Saint Paul, to charge and collect a state sales tax thereon of two percent (2%) or the average equivalent thereof, as a part of the sale price, is null and void and in conflict with the Constitution of the United States in the following particulars, to wit:

(a) That said tax is a tax on an instrumentality of the Government of the United States, namely, The Federal Land Bank of Saint Paul.

(b) That said law, as so applied to The Federal Land Bank of Saint Paul, violates Clause 2 of Article VI of the Constitution of the United States, which provides "This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; * * * anything in the Constitution or the laws of any state to the contrary notwithstanding."

(c) That said law, as so applied to The Federal Land Bank of Saint Paul, violates that part of Section 8 of Article I of the

Constitution of the United States, which provides: "The Congress shall have power: * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

XI

That the Defendants claim and contend that the Plaintiff is liable for the payment of state sales tax on account of said personal property sales transactions, and that the Defendant, Bismarck Lumber Company, is entitled to charge and collect such tax from the Plaintiff at the rate of two percent (2%) on the gross receipts from said personal property sales, as a part of the sales price therefor, in addition to the regular sales price for said merchandise; and that by virtue thereof, the Defendant, Bismarck Lumber Company, is obliged to pay to the Defendant Owen T. Owen, as Tax Commissioner of the State of North Dakota, for the use and benefit of the State of North Dakota the amount of said sales tax; and the Defendants further claim and contend that Chapter 249, Session Laws of North Dakota for 1937, insofar as the same provides for the payment by each retailer of the sales tax in the amount of two percent (2%) upon the gross receipts from all sales of personal property sold and delivered to the Plaintiff within North Dakota; and insofar as the same provides that each retailer shall add the sales tax imposed under said Act, or the average equivalent thereof, to the sales price on all personal property sold by such retailer at retail to the Plaintiff within North Dakota, is a valid and constitutional legislative enactment.

Wherefore, the Plaintiff prays that the Court adjudicate and determine the rights, liability, status, and legal relations of the parties of this action, in respect to the personal property sale transactions, statutes, and constitutional provisions herein alleged; that it be adjudged and determined that the Plaintiff is not liable for the payment of any state sales tax on account of said personal property sale transactions; that it be adjudged and determined that the Plaintiff is entitled to purchase personal property from retailers within the State of North Dakota for use in the transaction of its business without the payment of any state sales tax thereon; and for such other and further adjudications and determinations as may be necessary and proper in declaring the rights, liability, status, or other legal relations of the parties of this action, in connection with the controversy alleged herein.

11 Dated at Bismarck, North Dakota, this 9th day of March A. D., 1938.

GEO. F. SHAFER,
Attorney for the Plaintiff.
Office and Post Office Address,
Bismarck, North Dakota.

JOHN THORPE,
Attorney for the Plaintiff.
Office and Post Office Address,
346 Jackson Street, St. Paul, Minnesota.

ROBERT J. BARRY,
Of Counsel.
Office and Post Office Address,
346 Jackson Street, St. Paul, Minnesota.

Duly sworn to by Geo. F. Shafer; jurat omitted in printing.

11-A In District Court of Burleigh County

[Title omitted.]

Admission of service

Due and personal service of Summons and Complaint in the above entitled action, by receipt of a copy thereof, is hereby admitted this 9th day of March A. D. 1938, at Bismarck, North Dakota.

OWEN T. OWEN,
As Tax Commissioner of the
State of North Dakota.

11-B In District Court of Burleigh County

[Title omitted.]

Admission of Service

Due and personal service of Summons and Complaint in the above entitled action, by receipt of a copy thereof, is hereby admitted this 9th day of March A. D. 1938, at Bismarck, North Dakota.

BISMARCK LUMBER CO.
By J. A. LARSON,
President.

12 In District Court of Burleigh County

[Title omitted.]

Demurrer of defendant, Bismarck Lumber Co.

Now comes the Defendant, Bismarck Lumber Company, a corporation, and demurs to the Plaintiff's Complaint in the above-entitled action upon the ground and for the reason that the said Complaint does not state facts sufficient to constitute a cause of action.

Dated this 25th day of March A. D. 1938.

ALVIN C. STRUTZ,
Attorney General,
T. A. THOMPSON,
Assistant Attorney General,
B. F. TILLOTSON,
Assistant Attorney General,
Attorneys for Bismarck Lumber Company, a Corporation,
Bismarck, North Dakota.

13 In District Court of Burleigh County

[Title omitted.]

Demurrer of defendant, Owen T. Owen

Now comes the defendant, Owen T. Owen, as Tax Commissioner of the State of North Dakota, and demurs to the plaintiff's complaint in the above-entitled action upon the ground and for the reason that the said complaint does not state facts sufficient to constitute a cause of action.

Dated this 25th day of March A. D. 1938.

ALVIN C. STRUTZ,
Attorney General,
T. A. THOMPSON,
Assistant Attorney General,
B. F. TILLOTSON,
Assistant Attorney General,
Attorneys for Owen T. Owen,
State Tax Commissioner,
Bismarck, North Dakota.

14 In District Court of Burleigh County

[Title omitted.]

Order sustaining demurrers

The above-entitled matter having come on for hearing before the Court at the Court House in the City of Bismarck, County of Burleigh, and State of North Dakota, Honorable Fred Jansonius, District Judge, presiding, upon the Plaintiff's Complaint herein and the Defendants' Demurrers to said Complaint; Geo. F. Shafer, appearing as attorney for the Plaintiff, and Messrs. Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, appearing as attorneys for the Defendants; and the Court having heard the arguments of counsel and being fully advised in the premises;

It is ordered by the Court that the said Defendants' Demurrers to the Complaint herein, be and the same are hereby, in all things sustained.

Dated this 6th day of May A. D. 1938.

By the Court:

FRED JANSONIUS,
Judge.

15 In District Court of Burleigh County

[Title omitted.]

Order for judgment

The above entitled matter having come on for hearing before the Court at the Court House in the City of Bismarck, County of Burleigh, and State of North Dakota, Honorable Fred Jansonius, District Judge, presiding, upon the Plaintiff's Complaint herein and the Defendants' Demurrers to said Complaint; Geo. F. Shafer, appearing as attorney for the Plaintiff, and Messrs. Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, appearing as attorneys for the Defendants; and the Court having heard the arguments of counsel and being fully advised in the premises; and the Court having made its Order herein sustaining the Defendants' Demurrers, and the Plaintiff herein having declined to amend its Complaint;

It is ordered by the Court that in the above entitled action judgment be entered in favor of the Defendants, Bismarck Lumber Company, and Owen T. Owen, as Tax Commissioner of the State of North Dakota, and against the Plaintiff, the Federal Land Bank of Saint Paul, a body corporate, sustaining the said

Defendants' Demurrers to the Complaint, and adjudging, determining, and declaring that the Plaintiff herein is liable for and not exempt from the payment of a state sales tax under Chapter 249, Session Laws of North Dakota for 1937, known as the State Sales Tax Act; that the said Plaintiff is not entitled to purchase goods, wares, and merchandise from the Defendant, Bismarck Lumber Company, or from any other dealer, or dealers authorized to do business under the statute aforesaid, at retail within
16 the State of North Dakota, for use in the transaction of the Plaintiff's business in said State, except as otherwise provided in said State Sales Tax Act, without the payment of the state sales tax thereon as provided by said statute;

It is further ordered that the Defendant, Bismarck Lumber Company, have judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, for the amount of the said state sales tax accrued upon the purchase of such goods, wares, and merchandise, as set forth in the Complaint herein, namely, the sum of $8.02; and that the Defendants have and recover of and from the Plaintiff, their costs and disbursements herein, to be taxed and allowed by the Clerk of this Court.

Dated this 6th day of May A. D. 1938.

By the Court:

FRED JANSONIUS,
Judge.

17 In District Court, Fourth Judicial District, County of Burleigh

THE FEDERAL LAND BANK OF SANT PAUL, A BODY CORPORATE, PLAINTIFF

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS

Judgment

The above entitled matter having come on for hearing before the Court at the Court House in the City of Bismarck, County of Burleigh, and State of North Dakota, Honorable Fred Jansonius, District Judge, presiding, upon the Plaintiff's Complaint herein and the Defendants' Demurrers to said Complaint; Geo. F. Shafer, appearing as attorney for the Plaintiff, and Messrs. Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, appearing as attorneys for the Defendants; and the Court having heard the

arguments of counsel and being fully advised in the premises: and the Court having made its Order herein sustained the Defendants' Demurrers, and the Plaintiff herein having declined to amend its Complaint; and the Court having made its Order for Judgment herein in favor of the Defendants and against the Plaintiff;

It is adjudged, considered, determined, and declared by the Court that the Defendants, Bismarck Lumber Company, and Owen T. Owen, as Tax Commissioner of the State of North Dakota do have and recover judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, herein, that said Defendants' Demurrers to the Complaint be and the same are sustained; that the Plaintiff is liable for and not exempt from the payment of a state sales tax under the provisions of Chapter 249, Session Laws of North Dakota for 1937, known as the State Sales Tax Act; that the said Plaintiff is not entitled to purchase goods, wares, and merchandise from the Defendant, Bismarck Lumber Company, or from any other dealer, or dealers,
18 authorized to do business under the statute aforesaid, at retail within the State of North Dakota, for use in the transaction of the Plaintiff's business in said State, except as otherwise provided in said State Sales Tax Act, without the payment of the state sales tax thereon as provided by said statute;

It is further adjudged, considered, determined, and declared that the Defendant, Bismarck Lumber Company, have judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, for the amount of the said state sales tax accrued upon the purchase of such goods, wares, and merchandise, as set forth in the Complaint herein, namely the sum of $8.02; and that the Defendants have and recover of and from the Plaintiff, their costs and disbursements herein, taxed and allowed in the sum of $ none.

Witness the Hon. Fred Jansonius, Judge of the District Court in and for the County of Burleigh, Fourth Judicial District, of the State of North Dakota, and my hand and the seal of said Court on this 6th day of May A. D. 1938.

[SEAL.] CHAS. FISHER,
Clerk of said Court.

19 In District Court of Burleigh County

[Title omitted.]

Notice of appeal

To the above-named Defendants, and to Messrs. Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, Attorneys for said Defendants:

You and each of you, will please take notice that the above-named Plaintiff and Appellant hereby appeals to the Supreme Court of the State of North Dakota from that certain judgment rendered in the District Court of Burleigh County, on the 6th day of May 1938, in the above entitled action, in favor of the Defendants and against the Plaintiff, and from the whole thereof.

Dated at Bismarck, North Dakota, this 7th day of May 1938.

GEO. F. SHAFER,
Attorney for the Plaintiff and Appellant,
Office and Post Office Address,
Bismarck, North Dakota.

JOHN THORPE,
Attorney for the Plaintiff and Appellant,
Office and Post Office Address,
321 Jackson Street, St. Paul, Minn.

ROBERT J. BARRY,
Of Counsel,
Office and Post Office Address,
321 Jackson Street, St. Paul, Minn.

20 In District Court of Burleigh County

[Title omitted.]

Specifications of error

The Plaintiff and Appellant hereby specifies the following errors on its appeal herein:

I

That the District Court erred in making its Order for Judgment in the above-entitled action, dated May 6, 1938, wherein the Court ordered judgment as follows:

"It is ordered by the Court that in the above entitled action judgment be entered in favor of the Defendants, Bismarck Lumber Company, and Owen T. Owen, as Tax Commissioner of the State of North Dakota, and against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, sustaining the said Defendants' Demurrers to the Complaint, and adjudging, determining, and declaring that the Plaintiff herein is liable for and not exempt from the payment of a state sales tax under Chapter 249, Session Laws of North Dakota for 1937, known as the State Sales Tax Act; that the said Plaintiff is not entitled to purchase

goods, wares, and merchandise from the Defendant, Bismarck Lumber Company, or from any other dealer, or dealers authorized to do business under the statute aforesaid, at retail within the State of North Dakota, for use in the transaction of the Plaintiff's business in said State, except as otherwise provided in said State Sales Tax Act, without the payment of the state sales tax thereon as provided by said statute:

"It is further ordered that the Defendant, Bismarck Lumber Company, have judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, for the amount of the said state sales tax accrued upon the purchase of such goods, wares, and merchandise, as set forth in the Complaint herein, namely, the sum of $8.02; and that the Defendants have and recover of and from the Plaintiff, their costs and disbursements herein, to be taxed and allowed by the Clerk of this Court."

II

That the District Court erred in rendering that certain Judgment in the above entitled action, dated May 6, 1938, in
21 favor of the Defendants and against the Plaintiff, wherein the Court adjudged, determined and declared as follows:

"It is adjudged, considered, determined, and declared by the Court that the Defendants, Bismarck Lumber Company, and Owen T. Owen, as Tax Commissioner of the State of North Dakota, do have and recover judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, herein, that said Defendants' Demurrers to the Complaint be and the same are sustained; that the Plaintiff is liable for and not exempt from the payment of a state sales tax under the provisions of Chapter 249, Session Laws of North Dakota for 1937, known as the State Sales Tax Act; that the said Plaintiff is not entitled to purchase goods, wares, and merchandise from the Defendant, Bismarck Lumber Company, or from any other dealer, or dealers, authorized to do business under the statute aforesaid, at retail within the State of North Dakota, for use in the transaction of the Plaintiff's business in said State, except as otherwise provided in said State Sales Tax Act, without the payment of the state sales tax thereon as provided by said statute:

"It is further adjudged, considered, determined, and declared that the Defendant, Bismarck Lumber Company, have judgment against the Plaintiff, The Federal Land Bank of Saint Paul, a body corporate, for the amount of the said state sales tax accrued upon the purchase of such goods, wares, and merchandise, as set forth in the Complaint herein, namely, the sum of $8.02; and that

the Defendants have and recover of and from the Plaintiff, their costs and disbursements herein, taxed and allowed in the sum of $ none."

III

That the District Court erred in failing and refusing to grant judgment upon the pleadings in this action in favor of the Plaintiff and against the Defendants for the specific relief demanded in the Complaint; and particularly for failing and refusing to adjudge and declare as follows:

(1) That the Plaintiff is specifically exempted from the payment of any state sales tax under the provisions of Section 26 of the Federal Farm Loan Act and the provisions of Subsection (A), Section 3 of the State Sales Tax Act, Chapter 249, Session Laws of North Dakota for 1937.

(2) That the Federal Land Bank of Saint Paul is an instrumentality of the United States, and as such instrumentality, is not liable for the payment of any state sales tax without
22 the express consent of Congress, and that such consent has not been given.

(3) That Chapter 249, Session Laws of North Dakota for 1937, insofar as the same purports to impose a state sales tax on goods, wares, or merchandise, purchased by The Federal Land Bank of Saint Paul for its use in the transaction of its business, and insofar as said statute purports to direct, authorize, and empower each retailer who sells goods, wares, or merchandise to The Federal Land Bank of Saint Paul, to charge and collect a state sales tax thereon of two per cent (2%) or the average equivalent thereof, as a part of the sale price, is null and void and in conflict with the Constitution of the United States in the following particulars, to wit:

(a) That said tax is a tax on an instrumentality of the Government of the United States, namely, The Federal Land Bank of Saint Paul.

(b) That said law, as so applied to The Federal Land Bank of Saint Paul, violates Clause 2 of Article VI of the Constitution of the United States, which provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; * * * anything in the Constitution or the laws of any state to the contrary notwithstanding."

(c) That said law, as so applied to The Federal Land Bank of Saint Paul, violates that part of Section 8 of Article I of the Constitution of the United States, which provides: "The Con-

gress shall have power: * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

IV

That the District Court erred in failing and refusing to grant judgment upon the pleadings in this action in favor of the Plaintiff and against the Defendants, to the effect that the Plaintiff is not liable for the payment of any state sales tax on
23 account of the personal property sales transactions alleged in the Complaint, and that the Plaintiff is entitled to purchase personal property from retailers within the State of North Dakota for use in the transaction of its business without payment of any state sales tax thereon.

Dated this 7th day of May 1938, at Bismarck, North Dakota.

GEO. F. SHAFER.
Attorney for the Plaintiff and Appellant,
Office and Post Office Address,
Bismarck, North Dakota.

JOHN THORPE.
Attorney for the Plaintiff and Appellant,
Office and Post Office Address,
316 Jackson Street, St. Paul, Minn.

ROBERT J. BARRY.
Of Counsel,
Office and Post Office Address,
316 Jackson Street, St. Paul, Minn.

24 In District Court of Burleigh County

[Title omitted.]

Stipulation waiving undertaking for costs on appeal

Whereas, the Plaintiff and Appellant is about to take an appeal to the Supreme Court of the State of North Dakota, from that certain Judgment rendered in the District Court of Burleigh County, in the above-entitled action, in favor of the Defendants, and against the Plaintiff, on the 6th day of May 1938;

Now, therefore, it is hereby Stipulated by and between the parties hereto, by and thru their respective attorneys, that

an Undertaking for Costs upon such Appeal shall not be required of the Plaintiff and Appellant, and the same is hereby waived.

Dated this 7th day of May 1938, at Bismarck, North Dakota.

GEO. F. SHAFER,
JOHN THORPE,
ROBERT J. BARRY,
Attorneys for the Plaintiff and Appellant.

ALVIN C. STRUTZ,
Attorney General of the State of North Dakota.

T. A. THOMPSON,
Assistant Attorney General,

B. F. TILLOTSON,
Assistant Attorney General,
Attorneys for the Defendants and Respondents.

25 [Clerk's certificate to foregoing transcript omitted in printing.]

26 In Supreme Court of North Dakota

File No. 6549

THE FEDERAL LAND BANK OF SAINT PAUL, A BODY CORPORATE,
APPELLANT

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS STATE TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA,
RESPONDENTS

Minute entry of argument and submission

June 14, 1938

Appearances: For the Appellant, Mr. Geo. F. Shafer, Mr. John Thorpe, and Mr. Peyton R. Evans; contra, Mr. B. F. Tillotson, Assistant Attorney General.

Cause argued, submitted, and taken under advisement.

Morris and Sathre, JJ., being disqualified, did not sit on the argument of the above causes. Hon P. G. Swenson, Judge of the First Judicial District, and Hon. G. Grimson, Judge of Second Judicial District, sitting in their stead.

27 In Supreme Court of North Dakota

[Title omitted.]

Minute entry of reargument and submission

July 26, 1939

Appearances: For the Appellant: Mr. Geo. F. Shafer; contra, Mr. B. F. Tillotson, Assistant Attorney General.

Cause re-argued, submitted, and taken under advisement.

Morris and Burke, JJ. did not participate, Hon. P. G. Swenson, Judge of the First Judicial District, and Hon. G. Grimson, Judge of Second Judicial District, sitting in their stead.

28 In Supreme Court of North Dakota

File No. 6549

THE FEDERAL LAND BANK OF ST. PAUL, A BODY CORPORATE, PLAINTIFF AND APPELLANT

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS AND RESPONDENTS

Judgment

Filed March 17, 1941

This action coming on to be heard at the June A. D. 1939 term of this Court at the Supreme Court rooms in the City of Bismarck, State of North Dakota:

Present: W. L. Nuessle, Chief Justice: A. M. Christianson, A. G. Burr and P. G. Swenson, and G. Grimson, Associate Justices; and the appeal herein having been reargued by Mr. George F. Shafer for the Appellant, and by Mr. B. F. Tillotson, Assistant Attorney General, for Respondents, and the court having been advised thereon, it is now considered, ordered and adjudged that the judgment of the said District Court within and for said Burleigh County appealed from herein, be, and the same is, hereby affirmed.

And it is further ordered, that this cause be, and it is hereby, remanded to the District Court for further proceedings according to law, and the order of this court.

And it is further considered and adjudged, that Respondents have and recover of the Appellant costs and disbursements on this

appeal expended, to be taxed and allowed in the District Court.
Dated March 17, 1941.
By the Court,

A. G. BURR.
Now Chief Justice.

Attest:
[SEAL] J. H. NEWTON, Clerk.

[File Endorsement omitted.]

29 In Supreme Court of North Dakota

[File endorsement omitted.]

THE FEDERAL LAND BANK OF ST. PAUL, A BODY CORPORATE, PLAINTIFF AND APPELLANT

vs.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, DEFENDANTS AND RESPONDENTS

1. The tax imposed by the State Sales Tax Act (Chapter 249, Session Laws 1937), is laid upon the buyer and not upon the seller. Jewel Tea Company v. State Tax Commissioner, 70 N. D. —, 293 N. W. 386.

2. The entire power of taxation abides in the states and except as restrained by the Constitution of the United States, the power of the states to tax is absolute.

3. The test as to whether a tax laid on a federal instrumentality is constitutional and valid, is, does it hinder or embarrass the instrumentality in the performance of its governmental functions. If it does, it is unconstitutional. If it does not, it is valid.

4. The tax laid under the State Sales Tax Act (Chapter 249, Session Laws 1937) on sales to a federal land bank of lumber and other building material to be used in the conservation and repair of buildings and fences on farm lands acquired by the bank through the foreclosure of mortgages securing farm loans made pursuant to the Federal Farm Loan Act (Chapter 245, 39 Stats. 360, 12 U. S. C. A., sections 641 et seq.), and acts amendatory thereto, is, for reasons stated in the opinion, a valid and constitutional tax.

(Syllabus by the Court)

From a judgment of the District Court of Burleigh County, Honorable Fred Jansonius, Judge, plaintiff appeals.

30 Affirmed.

Opinion of the Court by Nuessle, J.

George F. Shafer, of Bismarck, and John Thorpe, of St. Paul, Minnesota, attorneys for the appellant.

Peyton R. Evans and Gerald E. Lyons, of Washington, and Robert J. Barry, of St. Paul (of Counsel).

Alvin C. Strutz, Attorney General, and T. A. Thompson and B. F. Tillotson, Assistant Attorneys General, of Bismarck, for respondents.

31 FEDERAL LAND BANK OF ST. PAUL

v.

BISMARCK LUMBER CO. ET AL.

Opinion

Filed March 17, 1941

NUESSLE, J. The question for determination in this case is as to whether the Federal Land Bank of St. Paul, hereinafter referred to as the appellant, is subject to the North Dakota Sales Tax on purchases made under the circumstances hereinafter disclosed.

The Sales Tax Act (chapter 249, Session Laws 1937) in force at the time this controversy arose, provides:

"SEC. 2. There is hereby imposed * * * a tax of two per cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users * * *.

"SEC. 3. There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State * * *."

The appellant, the Federal Land Bank of St. Paul, a body corporate, created pursuant to the Act of Congress, approved July 17, 1916 (chapter 245, 39 Stats. 360, 12 U. S. C. A., sec. 641 et seq.), and acts amendatory thereof, known and cited as the Federal Farm Loan Act, is engaged in the business of making loans to farmers in the state of North Dakota and states adjacent thereto. The respondent, The Bismarck Lumber Company, is engaged in the business of selling lumber and other building material as a retail dealer in Bismarck. In October, 1937, the appellant bought certain lumber and other building material from

the respondent. This material was for use in repairing and improving the buildings and fences on certain farm lands owned by the appellant in North Dakota. These lands had been
32 acquired by appellant through the foreclosure of mortgages taken to secure farm loans made in the course of its business. The respondent added to the regular sales price of the material so bought, two per cent thereof, the amount of the state sales tax, reckoned pursuant to the provisions of section 2 of the Sales Tax Act, supra. The appellant paid the sales price but refused to pay the tax, claiming that no tax could be collected from it for the reason that it was an agent and instrumentality of the federal government and, therefore, exempt from any state taxation. The respondent, on the other hand, contended that the material so sold by it was subject to such tax and that it was its duty to collect the same. Action was then brought by the appellant to determine the controversy thus arising and for a declaratory judgment adjudicating and determining the rights, liabilities, status, and legal relations of the parties, and whether the sales in question were subject to the tax. The State Tax Commissioner was joined as a party defendant. The controversy was submitted to the District Court of Burleigh County and that court held that the sales made to the appellant Bank by the respondent Lumber Company were subject to the tax; that the lumber Company was required to collect and pay over to the State the tax on such sales, and that the appellant Bank was under legal obligation to pay the same. Judgment was entered accordingly. Thereupon the Bank perfected the instant appeal.

The tax here in question is imposed on retail sales. It is general in its operation. It is required to be paid by the buyer. Jewel Tea Company v. State Tax Commissioner, 70 N. D. —, 293 N. W. 386.

The appellant contends it is wholly exempt from the tax pursuant to section 3a of the Sales Tax Act, supra, since it is an instrumentality of the United States and, as such, is not liable for the payment of any state sales tax without the consent of Congress; that such consent has not only not been given,
33 but on the contrary, by section 26 of the Farm Loan Act, the appellant has been expressly exempted from the payment of such tax. The appellant further contends that as it is an instrumentality of the federal government, the State Sales Tax Act, supra, is, as attempted to be applied in this case, null and void and in conflict with the Constitution of the United States in that it violates section 8 of Article 1 of the Constitution, which provides:

"The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution

the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

and clause 2 of Article 6 of the Constitution, which provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof: * * * shall be the supreme law of the land: * * * anything in the Constitution or the laws of any state to the contrary notwithstanding."

The issues thus made are so important and their solution so difficult, that we deem it necessary to consider somewhat at length the powers and rights of the federal and state governments with respect to the matter of taxation.

As we read the authorities they establish beyond question that the fact that Congress may have decreed an exemption from state taxation is not in itself enough. Though Congress may waive immunity from taxation, it cannot by its mere fiat confer immunity. Its action in that respect must be grounded upon a constitutional foundation. It must be predicated upon the proposition that "the states have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." M'Culloch v. The State of Maryland et al., 4 Wheat. 316, 4 L. ed. 579; Osborn et al. v. The Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Clallam County v. United States, 263 U. S. 341, 44 S. Ct. 121, 68 L. ed. 328. But except as thus restrained the power of the states to tax is absolute.

34

We have found no better statement respecting the concurrent power of taxation of the national and state governments and the manner of the exercise of that power than that of Mr. Justice Strong in Union Pacific R. R. Company v. Peniston, 18 Wall. 5, 21 L. ed. 787, which we quote:

"As was said in Lane County v. Oregon, 7 Wall. 77, 19 L. ed. 101: 'In respect to property, business, and persons within their respective limits, the power of taxation of the states remained, and remains entire, notwithstanding the Constitution.' It is indeed, a concurrent power (concurrent with that of the general government), and in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed

in the state constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the
35 extent just indicated, it is as complete in the states as the like power within the limits of the Constitution is complete in Congress. Such are the opinions we have expressed heretofore, and we adhere to them now.

"There are, we admit, certain subjects of taxation which are withdrawn from the power of the states, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National Government is ligitimately exercised within the states. While it is true that government cannot exercise its power of taxation so as to destroy the state governments, or embarrass their lawful action, it is equally true that the states may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government. The constitution contemplates that none of these powers may be restrained by state legislation. But it is often a difficult question whether a tax imposed by a state does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes must be laid. The states are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

The pronouncement of Mr. Chief Justice Marshall in M'Culloch v. The State of Maryland, supra, that the power to tax involves the power to destroy, is now accepted as axiomatic. But considering the relationship of the federal and state governments, it is just as true that the power to exempt from taxation involves the power to destroy. Death may ensue as well from starvation as from strangulation. So, as was said in Union Pacific R. R. Company v. Peniston, supra:

"The states are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

36 And the same thought is expressed in Metcalf v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384, where it is said: "But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence, the limitation upon the taxing powers of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it.

"While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of the tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

The foregoing excerpt is quoted with approval in James v. Dravo Contracting Company, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A. L. R. 318. Again in Educational Films Corporation v. Ward, 282 U. S. 399, 75 L. ed. 400, 51 S. Ct. 170, 71 A. L. R. 1226, it is held: "The immunity of Federal instrumentalities from state taxation must be given such a practical construction as will not, on the one hand, unduly restrict the power of the government imposing the tax, or, on the other hand, the exercise of the functions of the government which may be affected by it."

The reasoning of the opinion in M'Culloch v. State of Maryland, supra, is that the federal government can act only through agents; that it may employ such agents or agencies as it deems advisable, so it may create corporate agencies to execute its powers; that the states may not so tax its agents, whether individual or corporate, as to hinder or embarrass them in the

37 performance of their governmental duties. The test is: Does the tax sought to be imposed obstruct governmental operations? If it does, it is unconstitutional. If it does not, it is

valid. And this is a judicial and not an administrative or legislative question.

If a designated agent is an individual, no tax may be imposed that will in any way interfere with the performance of his governmental functions. But, in all other respects, he is subject to taxation the same as any other citizen, and the same rule applies with respect to corporate agencies.

"* * * and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. The most important agents of the Federal Government are its officers; but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. * * * The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." First National Bank v. Commonwealth of Kentucky, 9 Wall. 353, 76 U. S. —, 19 L. ed. 701, 703.

So a corporate agency is as much amenable to the tax laws of the states as is an individual agent. Accordingly, if a governmental agent engages in an enterprise which is not essential to the performance of his or its services to the government, to that extent he or it is subject to state taxation. This is wholly consistent with the concluding paragraph of the opinion in M'Culloch v. Maryland, supra:

38 "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank and is, consequently, a tax on the operation of an instrument

employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

And it is likewise consistent with what is said in Osborn et al. v. The Bank of the United States, supra, where the holding in M'Culloch v. Maryland was reexamined.

"We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially."

The Federal Farm Loan Act provides that the banks created pursuant to its provisions may be designated "depositaries of public moneys * * *; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties as depositaries of public money as financial agents of the Government as may be required of them." Section 701, 12 U. S. C. A. The banks are also empowered to invest their funds in the purchase of qualified first mortgages on land situated within the land bank district within which they are organized or for which they are acting. Section 781, 12 U. S. C. A. We had occasion to consider the manner of the exercise of this power to some extent in Byrne v. Federal Land Bank of St. Paul, 61 N. D. 265, 237 N. W. 797. With respect to the matter of taxation material here, section 26 of the act (sections 931–933, 12 U. S. C. A.) provides:

39 "SEC. 931. Every federal land bank and every national farm loan association, including the capital and reserve or surplus therein, and the income derived therefrom, shall be exempt from federal, state, municipal and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section 761 and section 781 of this chapter. First mortgages executed to federal land banks or to joint stock land banks and farm loan bonds issued under the provisions of this act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such, they

and the income derived therefrom shall be exempt from Federal, State, municipal and local taxation * * *."

SEC. 933. Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

The constitutionality of the original Farm Loan Act was challenged in Smith v. Kansas City Title & Trust Company, 255 U. S. 180, 41 S. Ct. 243, 65 L. ed. 577, on the ground that the designation of the banks created by the act as fiscal agents and instrumentalities of the government was but a pretext; that the banks were, in fact, created for the purpose of loaning money on farm mortgages; that this was essentially a private business and accordingly Congress had no power to endow the banks with the right to engage in that business and to exempt bonds issued by them from taxation.

The court held, however, "that the creation of these banks and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds, brings them within the creative power of Congress though they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm securities at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create those institutions." The clear implication of what is thus said by the court is that the making of loans on farm security is a private business, not governmental in character. That it is an activity additional but not essential to that which the banks were created to perform. And certainly there is nothing there said to imply that, so far as "these other privileges and duties to facilitate the making of loans upon farm securities" are concerned, the states are powerless to tax.

The court cited as an authority sustaining this holding in the Smith case, the case of First National Bank v. Fellows, 244 U. S. 416, 37 S. Ct. 734, 61 L. ed. 1233, L. R. A. 1918C, 283, Ann. Cases 1918D, 1169. In the Fellows case, the power of a national bank under the act of December 23, 1913, (38 Stats. at L., 262, chap. 6, 6 Fed. Stats. Ann. (2nd ed.) 817, section 11 (k),) to act as trustee, executor, administrator or registrar of stocks and bonds "when not in contravention of state or local law" was challenged by the attorney general of the state of Michigan. See Fellows, Attorney General ex rel. Union Trust Company, et al. v. First

National Bank of Bay City, 192 Mich. 640, 159 N. W. 335. The attorney general contended that this act conferred on national banks, powers in excess of the authority of Congress and was, therefore, in contravention of the constitution. It appears that the laws of Michigan authorized corporations to perform the functions in question. The court denied the attorney general's challenge on the authority of M'Culloch v. Maryland, supra, and Osborn et al. v. The Bank of the United States, supra, and said:

"What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in cooperation with or as part of its public authority. Manifestly this excluded the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exer-
41 tion of state authority to prohibit Congress from exerting a power which, under the Constitution it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if by state law state banking corporations, trust companies, or others which by reason of their business are rivals or quasi-rivals of national banks are permitted to carry on such business. This must be since the State may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

As we read the opinion in Bank v. Fellows, supra, the effect of the court's holding is that Congress has the power to confer upon governmental agencies and instrumentalities the right to exercise functions which are not, in the first instance, essential to enable those agencies to perform their duties efficiently as

such, if, under the laws of the state in which they may be located private institutions somewhat competitive in character ("rivals or quasi-rivals") have the right to perform similar functions and thereby are enabled to compete with the governmental agencies on a favored footing in the carrying on of business. But the court recognized that in such case the state was not barred from exercising the right of regulation, for the court said:

"Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

42 It would seem, by parity of reasoning, that since business as carried on by private competitive enterprise is subject to the state's burden of taxation, to exempt governmental instrumentalities engaged in business not governmental in character from such burden must operate, so far as competitive business is concerned, to the detriment of private enterprise, and thus to the great disadvantage of the states. If this be true, there cannot be in such case that "harmonious and concordant exercise of national and state powers" contemplated and necessary under our theory of government.

There is another principle that should be taken into account in considering whether or not enterprises, private in character, carried on by governmental agencies in addition to though not essential to the performance of their governmental functions, shall be subject to taxation by the states. It was held in the early case of Bank of the United States v. Planters Bank of Georgia, 9 Wheat. 904, 6 L. ed. 244, in an opinion written by Chief Justice Marshall, that:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted."

So far as we can discover, there has never been any departure from that holding. On the contrary, it has been reaffirmed again and again. As, for instance, in the case of South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261, 4 Ann. Cases 737. There it appears that the State of South Carolina

had established dispensaries for the wholesale and retail sale of liquor and prohibited sale by others than the dispensaries. The United States demanded the license tax prescribed by the In-
43 ternal Revenue Act for dealers in intoxicating liquors and the state paid the same. Thereafter the state commenced an action in the court of claims to recover the amount thus paid. Judgment was entered for the United States. The state appealed. The Supreme Court affirmed the judgment and, among other things, speaking through Mr. Justice Brewer said:

"The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. Vance v. W. A. Vandercook Co., 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession in like manner of tobacco, oleomargarine, and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow, and the whole body of internal revenue tax be thus stricken down.

"More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed 'public utilities' including not merely therein the supply of gas and water but also the entire railroad system * * *.

"We may even go a step further. There are some insisting that the state shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers

to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government."

44 In this connection, in addition to the authorities cited in South Carolina v. United States, see, State of North Dakota v. Olson, 33 Fed. (2d) 848, and cases cited; Clinton v. State Tax Commission et al., 146 Kan. 407, 71 Pac. (2d) 857, and cases cited; Central Market Inc. v. King, 132 Neb. 380, 272 N. W. 244.

We come now to the facts in the instant case. The appellant, Federal Land Bank, is engaged in the business of loaning money to farm owners. It secures these loans by mortgages upon farms. Certain of its mortgagors defaulted. Appellant foreclosed and acquired title to the security. Some of the lands thus acquired had buildings on them. The buildings were in disrepair. Lumber was required to repair them in order to conserve the buildings and make them habitable for tenants. Appellant bought lumber to make these repairs. The State seeks to impose the sales tax here challenged—a tax which all other purchasers of lumber must pay. The appellant claims immunity from the tax on the ground that it is a federal instrumentality. If we read the case of M'Culloch v. Maryland, supra, aright, that claim must be predicated on the theory that to exact the tax would constitute an interference with the operations of the federal government. There can be no ground for such a contention here. It is true that the tenuous device resorted to by Congress to clothe the federal land banks in the garb of governmental instrumentalities and thus render their bonds tax exempt was held sufficient. Smith v. Kansas City Title & Trust Company, supra. And in Federal Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703, 29 A. L. R. 1, the exemption from taxation of the real estate mortgages taken by the banks was sustained. But it is one thing to hold the bonds of the land banks and the securities on which they are based tax exempt, and quite another to say that this tax exemption can be projected to so remote a business transaction as the purchase of lumber to repair buildings on

45 lands acquired by the banks in an enterprise additional to rather than incidental or related to the ostensible governmental purposes for which they were created. Certainly the imposition of the tax on the transaction here in question could not hinder or embarrass the performance of the governmental functions—acting as a depositary and financial agent and buying government securities—the appellant was created to perform. Shadow ought not to be confused with substance. "The rule that governmental instrumentalities are immune from taxation will

not be mechanically applied regardless of the consequence to the operations of government." Educational Films Corporation of America v. Ward, supra. And we cannot believe that the mere designation of an individual or corporation as a governmental agent confers on Congress the power to absolve every transaction in which that agent may engage or the property used or acquired in those transactions from liability to taxation in the state taxing district wherein the transactions are performed or the property held.

There has been an accelerating tendency to encroach in this direction on the rights of the states and to constrict their powers. This is made possible only by a disregard of the above rule which is but a restatement of the principle laid down in M'Culloch v. Maryland, and Osborn v. Bank of the United States, supra. We quote again from the latter case:

"We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate
46 character is merely an incident, which enables it to transact that business more beneficially."

The confusion, and consequent disregard of the principle above stated, has arisen because of failure to distinguish between operations essential to the performance of governmental service and operations additional but not essential to the performance of that service. This distinction is emphasized in First National Bank v. Commonwealth of Kentucky, supra, where it is said:

"But it is argued that the banks, being instrumentalities of the Federal Government, by which some of its important operations are conducted, cannot be subject to such state legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from that state taxation on the ground here stated, and this principle laid down in the case of M'Culloch v. The State of Maryland, 4 Wheat. 316, has been repeatedly affirmed by the court. But the doctrine has its foundation in the

proposition that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the states * * *. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States."

In First National Bank v. Fellows, supra, the court sustained the power of Congress to endow national banks with the authority to perform functions additional but not essential to their governmental functions. But this was solely on the theory that unless the banks possessed that additional power they would not be in a position of equality in competition with private enterprise carrying on the banking business. And Mr. Chief Justice White
47 was careful to say that in such case reasonable state regulations would be controlling. Accordingly, Congress may properly create corporations to act as governmental agents to execute any powers the government may possess. And these agents may be endowed with additional powers. But in view of the distinction made as between operations essential to the performance of governmental service and operations additional but not essential to the performance of that service, it follows that if those powers be not essential to the exercise of the governmental powers they must be considered and treated for all purposes the same as though exercised by individuals similarly engaged in governmental business or by any purely private enterprise. Otherwise, the federal government may embark in any business anywhere, any time, in competition with private enterprise, untrammeled by the regulations and free from the burden of taxation to which private enterprise is subject—something undreamed of by the framers of the Constitution and something not contemplated when the opinions in M'Culloch v. Maryland and Osborn v. Bank of the United States were written.

The power of Congress to create the Federal Land Banks was sustained because of "the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds." Smith v. Kansas City Title & Trust Company, supra. These then are the governmental functions they are to perform. Thence springs their immunity from taxation. As a matter of fact, these functions could as well be effected by pri-

vate bankers. For a private banker could serve as a depositary, a financial agent, and a purchaser of government securities. That the land banks are corporations is merely an incident which does not in the least effect the states' power to tax. "We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties for the same purpose, he would be equally protected in the exercise of those functions." Per Mr. Chief Justice Marshall in Osborn v. The United States
48 Bank, supra. Yet, if a private banker were appointed a government agent to perform these services (and the instance has been known) who would be so bold as to say that he thus was absolved from state taxation and other requirements to which other citizens not government agents were subject regardless of whether his operations in behalf of the government were thereby in any manner hampered or obstructed.

Loaning money at interest to private enterprise is not a governmental function. The fact that a loan is made to a farmer does not distinguish it in this respect from a loan made to a butcher, a baker, or a candlestickmaker. When the land banks engage in this business, though they be governmental instrumentalities, they do not change its character. They operate in a private field for private profit in competition with private enterprise. It is true that because of congressional favor they have the advantage of an inexhaustible source from which to draw in making their loans and at a most advantageous rate of interest. But the stock of the banks is, in the main, privately owned. Indeed, it all may be owned privately. If there be dividends, the government does not participate though it own stock. Private owners of stock do participate. The banks are not banks of general deposit and discount. The business done by them provides no outlet for governmental securities, because, forsooth, the funds in the banks are obtained from the government itself, except insofar as their stocks and bonds are purchased and paid for by others than the government. And the theory of the Land Bank Act is that money thus derived is to be used in making the farm loans on which the bonds are based. In Federal Land Bank v. Priddy, 295 U. S. 229, 55 S. Ct. 705, 79 L. ed. 1408, the court, after analyzing the statute creating the land banks has this to say concerning them: "They thus have many of the characteristics of private business corporations distinguishing them from the government itself and its municipal subdivisions and from corporations wholly government owned and created to effect an exclusively governmental purpose."

49 Since the farm loan business is not a business that is essential to enable the banks to perform the governmental function from which their tax immunity springs, to hold that the

appellant is immune from the tax here in question is, in effect, to hold that Congress may by its mere declaration empower an agency, created as appellant was created, to engage in any business and exempt it from taxation however remote or inconsequential the effect of the tax burden may be upon the exercise of its governmental function. Let us pursue the practical application of such a holding in the instant case to its logical consequences. If the appellant can repair the buildings on its farms without paying the tax required of other purchasers of lumber to make similar repairs, by the same token it can buy machinery and equipment to operate those farms without paying the tax that other farmers must pay. It can employ men to operate those farms and provide them with groceries and other supplies which private enterprise similarly engaged must pay. It can buy logs or set up lumber camps and log them itself; it can build mills and mill its own lumber; it can erect factories and operate stores and distributing plants—all free from state regulation and taxation. And so on ad infinitum. And the effect with respect to the states will be infinitely more disastrous than that which is envisioned with respect to the national government in South Carolina v. United States, supra. For individual initiative, lacking inducement, will languish; private enterprise, stifled by privileged and unburdened competition, will wither; and the states, their sources of sustaining revenue usurped and dried up, will starve.

In view of the foregoing considerations, we reach the conclusion that the tax here challenged meets the test laid down in M'Culloch v. Maryland, supra, and Osborn v. Bank of the United States, supra. It is a valid exercise of the inherent taxing power abiding in the states. Its imposition in no way obstructs or interferes with the governmental function the appellant land bank was created to perform. It does not burden or embarrass the constitutional operations of the national government. Accordingly, the State Sales Tax Act as applied in the instant case violates neither section 8 or Article 1, nor clause 2 of Article 6 of the Constitution of the United States.

But even though the authorities cited above be held not to sustain the conclusions we have predicated upon them, we are, nevertheless, of the opinion that the judgment of the court below must be affirmed. Section 26 of the Farm Loan Act (sections 931-933, 12 U. S. C. A.) quoted supra, is specific in its statement of tax exemptions. It provides that every land bank including the capital and reserve, or surplus therein, and the income derived therefrom, shall be exempt from federal, state, municipal, and local taxation, except taxes upon real estate acquired in satisfaction of debts or purchases at sales under judgments, decrees or mortgages held by it. Farm loan bonds issued by and first mort-

gages executed to the banks and the income derived therefrom are likewise exempted and to the same extent. And the last paragraph of section 26 (12 U. S. C. A. 933) reiterates that nothing in that section shall be construed to exempt the real property of the banks from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed.

It seems to us, that when Congress used the word "including" it sought to define exactly what was exempted, and when it used the word "except" and reiterated the exception, it evidenced its intention that, so far as the banks' real estate was concerned, it should be treated with respect to taxation exactly like real estate privately owned. The tax which the appellant challenges is a tax on sales required to be paid by the purchaser. The goods purchased were for use in and upon the real estate of the appellant Bank and not for use otherwise in carrying on the business of the Bank. Congress must have contemplated that the land banks would acquire lands, just as the lands in the instant case were acquired by the appellant, and it must have known that such lands might have buildings and fences upon them that
51 would need conservation and repair. And so the necessity would arise to buy the material needed for these purposes. Yet, it made no mention of taxes of the character here in question.

In view of its particularity with respect to the items that should be exempted from taxation, this silence is significant. The challenged tax is not a charge on the capital or the reserve or the surplus of the bank or the income derived from those items; nor is it a charge against the income derived from the farm loan bonds or the mortgages executed to the bank. It can only remotely affect those items. So it seems to us no implication can be drawn from the wording of the statute that transactions growing out of the use and operation of the lands should be exempted from reasonable and nondiscriminatory charges that private owners of similar lands are required to pay. If implication there may be, it is to the contrary.

"It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the

imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." Graves v. New York, 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

52 The judgment of the District Court is affirmed.

W. L. NUESSLE.
P. G. SWENSON,
District Judge.
G. GRIMSON,
District Judge.
A. G. BURR.

53 In Supreme Court of North Dakota

[File endorsement omitted.]
[Title omitted.]

Dissenting opinion

Filed March 17, 1941

CHRISTIANSON, J. (dissenting). I dissent. The question for decision here is whether sales of personal property within this State to a Federal Land Bank are subject to the State sales tax. The State Sales Tax Act (Ch. 249, Laws 1937) in force during the time involved in this controversy provided:

"SEC. 2. There is hereby imposed * * * a tax of two percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users * * *."

"SEC. 3. There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Con-

stitution or laws of the United States or under the Constitution of this State." * * *

"SEC. 4. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off, for income tax purposes may be credited upon subsequent payment of the tax herein provided; provided, that if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected. * * *."

* * * * *

"SEC. 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts. * * *."

54 "SEC. 7. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded."

The defendant Bismarck Lumber Company is engaged in the business of selling building materials as a retailer in Bismarck, North Dakota. During October 1937 the plaintiff Land Bank purchased from said defendant Lumber Company certain building materials for use in repairing, maintaining, and improving the buildings on certain farm properties then owned by the plaintiff Bank in North Dakota—which properties had been acquired by the said Bank in the regular course of its business as a Federal Land Bank. The purchase price of such building materials amounted to some $401.00, exclusive of any State sales tax. The defendant Lumber Company added to such sales price or charge the amount of the State sales tax, namely, two per cent of such sales price, or the sum of $8.02. The plaintiff Bank paid the sales price, but refused to pay the amount of the sales tax that the defendant Lumber Company had added to the sales price, claiming that sales to a Federal Land Bank are exempted from such sales tax and that the defendant Lumber Company was under no obligation to account for, or pay tax on, such sales to the State. The plaintiff Land Bank contended that the imposition of a sales tax upon its purchases are forbidden by Section 26 of the Federal Farm Loan Act, and by the Constitution of the United States, and that consequently the amount of such tax could not

55 be added to the sales price, and that the plaintiff Land

Bank was under no obligation to pay the same. The defendant Lumber Company, on the other hand, contended that the building material so sold by it was subject to such tax, and that consequently it was not only the right but the duty of the Lumber Company to add the amount of such sales tax to the purchase price. Action was brought by the Federal Land Bank against the Lumber Company and the State Tax Commissioner to obtain a determination of the controversy that had thus arisen and for a declaratory judgment adjudicating and determining the rights, liabilities, status, and legal relations of the parties, and for a determination whether the sales in question were subject to the sales tax and whether the Lumber Company might legally add the amount of the sales tax to the sales price and whether the plaintiff Land Bank was under obligation to pay the same. The controversy was submitted to the District Court of Burleigh County for determination and that court held that the sales by the Lumber Company to the plaintiff Land Bank were subject to the State sales tax; that the Lumber Company was required to collect and pay over to the State the sales tax on such sales, and that accordingly it might add the same to the sales price and that the plaintiff Bank was under legal obligation to pay the same. Judgment was entered in favor of the Lumber Company and the State Tax Commissioner and against the plaintiff, the Federal Land Bank of St. Paul, for $8.02, the amount of the sales tax in dispute, and the Federal Land Bank has appealed.

The appellant, the Federal Land Bank of St. Paul, contends:

1. That the imposition of the State sales tax upon the building material purchased by it within this State for the purpose of repairing and maintaining properties which it had acquired in the regular course of its business is forbidden by Section 26 of the Federal Farm Loan Act, 12 U. S. C. A., Para. 931.

56 2. That it is forbidden by implication by the Constitution and laws of the United States, because the Federal Land Bank of St. Paul is an instrumentality of the United States and the tax in question here may in no event be imposed without the express consent of Congress and that Congress has given no consent.

Since all valid congressional enactments are the supreme law of the land and beyond interference by a State, the validity of State taxation of Federal instrumentalities must depend upon (1) the power of Congress to create the instrumentality, and, (2) the intent of Congress as manifested by law to protect it from, or to render it subject to, State taxation.

The Supreme Court of the United States has ruled that Congress acted within its constitutional power, (a) in creating the Federal

Land Banks, and, (b) in exempting farm loan bonds issued by such Banks from Federal, State, municipal and local taxation. Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 S. Ct. 243, 64 L. ed. 577. The Court has declared that such Banks "are instrumentalities of the federal government, engaged in the performance of an important governmental function." Federal Land Bank v Priddy, 295 U. S. 229, 231, 55 S. Ct. 705, 706, 79 L. ed. 1408, 1411. See, also, Knox Nat. Farm Loan Assn. v. Phillips, 300 U. S. 194, 81 L. ed. 599. That Court, also, has condemned, as beyond the constitutional power of the state, a statute subjecting mortgages executed to a Federal Land Bank to the payment of a recording tax. Federal Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703, 29 A. L. R. 1.

The decisions of the United States Supreme Court are binding upon this Court and definitely establish, (1) that a Federal Land Bank is an instrumentality of the national government,
57 created by Congress, acting within its constitutional powers, to perform authorized governmental functions; and (2) that such Bank is constitutionally endowed with the same immunity from State taxation, that the national government itself would have been endowed with, if it had engaged in such activity directly.

When Congress creates a corporation to carry on some activity that the national government may constitutionally undertake, such corporation may be endowed with the government's immunity from suit (Keifer & Keifer v. Reconstruction Finance Corp. et al., 59 St. Ct. 516, 83 L. ed. 784), and from taxation. Smith v. Kansas City Title & Trust Co.; Graves v. New York ex rel. O'Keefe, 59 St. Ct. 595, 83 L. ed. 927, 120 A. L. R. 1466; Pittman v. Home Owners' Loan Corp., 308 U. S. 21, 84 L. ed. 11; 124 A. L. R. 1263; Roberts v. Federal Land Bank of New Orleans, — Miss. —, 196 So. 763; Federal Land Bank of Spokane v. Statelen, et al., 191 Wash. 155, 70 Pac. 2d. 1053; McGovern, et al., v. Federal Land Bank of St. Paul, — Minn. —, — N. W. —. Whether such immunity exists, and if so the extent thereof, are questions of congressional intention. Federal Land Bank v. Priddy, supra; Smith v. Kansas City Title & Trust Co., supra; Federal Land Bank of St. Paul v. DeRochford, 69 N. D. 382, 287 N. W. 522.

The plaintiff, Federal Land Bank, was established under authority of the Federal Farm Loan Act of July 17, 1916. 39 Stat. at L. 360, Ch. 245, 12 U. S. C. A., Sec. 641 et seq.

That Act provides:

"That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held,

purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation." 39 Stat. at L. 380, Ch. 245, Sec. 26 (12 U. S. C. A. Sec. 931.).

58 The State sales tax is not a tax imposed upon the retailer for the privilege of engaging in business or for the privilege of making the sale. The law lays the burden of the tax upon the purchaser. Jewel Tea Co. v. State Tax Commissioner, 70 N. D. —, 293 N. W. 386. It places upon the retailer the duty to collect the tax from the purchaser, and to account for and pay the tax collected over to the State Tax Commissioner (Monamoter Oil Co. v. Johnson, 292 U. S. 86, 93, 78 L. ed. 1141, 1147), but the law does not contemplate that the retailer shall pay the tax. On the contrary, he is forbidden to assume the tax or to hold out to the purchaser that the tax "will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded." Sales Tax Act, Section 7.

"The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. Only in event that the seller fails to pay over * * * the tax collected or to charge and collect it as the statute requires, is the burden cast on him." (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 43, 84 L. ed. 565, 568, 569.)

The State sales tax is an enforced contribution exacted by the State in the exercise of its taxing power to provide for the support of the government. 61 C. J. pp. 68, 69. It is a substantial, direct and discernible tax imposed upon the purchaser of personal property, which the seller is required to collect from the purchaser and pay over to the State Tax Commissioner. If the sales which gave rise to this controversy are subject to the

59 State sales tax, a tax of two percent of the sales price, or $8.02 must be paid by the plaintiff Federal Land Bank. In the Act providing for the establishment of Federal Land Banks, Congress said:

"Every Federal Land bank * * *, including the capital and reserve or surplus therein or the income derived therefrom, shall be exempt from * * * State taxation, except taxes upon real estate held, purchased or taken by said Bank under the provisions of Section eleven and Section thirteen of this Act."

it is difficult to see that this language evidences any intention on the part of Congress to render a Federal Land Bank subject to a State tax on purchases made by such Bank in carrying on the activities that such Bank was created to perform. It seems to evidence quite a contrary intention.

"Taxation" is the act of laying a tax. It is the process or means by which the taxing power is exercised. 27 Am. & Eng. Ency. L., 2d ed., p. 581; 1 Cooley on Taxation, 4th ed. p. 72, Sec. 7; 61 C. J. 66; 24 Cal. Juris, pp. 20, 21. Taxation is a comprehensive term; it is not restricted to taxes on property, but "covers every conceivable exaction which it is possible for a government to make" in the exercise of its taxing power. Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; Webster's New Int. Dictionary.

This is not a case where Congress has been silent. It has spoken clearly and emphatically. It has said: "Every Federal Land bank * * * including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank * * * under the provisions of" the Federal Farm Loan Act. Congress used the comprehensive term *taxation*. This includes every form of tax—every exaction that might be made for State, municipal or
60 local purposes by exercise of the taxing power. Congress considered not only the question whether a Federal Land Bank should be subject to or immune from the taxing power of the State, but whether any of its assets should be subject to such power; and it declared that every Federal Land Bank, including the capital and reserve or surplus therein or the income derived therefrom, shall be exempt from State taxation, and then declared further that the only exception to the immunity from State taxation should be "taxes upon real estate held, purchased, or taken by said bank under the provisions of section eleven and section thirteen" of the Federal Farm Loan Act. The plain and natural meaning of what Congress said is that the State taxing power shall not extend to a Federal Land Bank, or to any of its rights or assets, with the single exception of such real estate as the Bank may hold or have acquired under the provisions of sections 11 and 13 of the Federal Farm Loan Act.

The imposition of the State sales tax is State taxation. It is not a tax upon any of the real estate held by the Bank. It is a tax laid directly upon the Bank as a purchaser within this State (309 U. S. 49, 84 L. ed. 572) of certain building material to be utilized by it in repairing structures on lands that it has acquired upon the foreclosure of mortgages it has taken in the regular course of its business. If the State may impose a tax upon a Federal Land Bank because it purchases certain personal prop-

erty required in the conduct of its work in this State, the State may, also, impose a "use" tax if the Bank purchases such property without the State, and thereafter brings the property into this State and uses it here. Henneford v. Siles Mason Co., 300 U. S. 577, 81 L. ed. 814.

In the case of Federal Land Bank v. Crosland, 261 U. S. 374, 67 L. ed. 703, the Supreme Court of the United States held
61 that a tax imposed by the State of Alabama as a condition for the recording of a mortgage might not be imposed on a Federal Land Bank and that the imposition of such tax was forbidden by the Federal Farm Loan Act. The Supreme Court of Alabama sustained the tax on the ground that the amount of the recording tax was optional and that the Federal Land Bank was not required to put its mortgage on record and that if it did not record it, no tax was imposed, but that if it desired to have the mortgage recorded it must pay what others were required to pay for the registration of its security. The Supreme Court of the United States held this reasoning to be unsound, and pointed out that the laws of Alabama made it practically necessary to record real estate mortgages because unless recorded a mortgage would be of no effect as to a purchaser without notice, and that consequently the effect of the law was to impose the tax upon the mortgages of the Federal Land Bank and compel the Bank to pay such tax and that this was forbidden by the provisions of the Federal Farm Loan Act. The decision in the case of Federal Land Bank v. Crosland was adhered to and followed by the Supreme Court of the United States in its decision in Pittman v. Home Owners' Loan Corporation, supra. That case involved a tax imposed by the State of Maryland upon mortgages recorded or offered for record. The question arose whether mortgages taken by the Home Owners' Loan Corporation were subject to the tax. The Court held that the imposition of the tax was forbidden by the provisions of the Home Owners' Loan Act that "the Corporation, including its franchise, its capital, reserves, and surplus, and its loans and income" shall be exempt "from all taxation" imposed by "any state, county, municipality, or local taxing authority," except that "any real property
62 of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed." In the decision in the Pittman case, the Court said:

"Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' McCulloch v. Maryland, 4 Wheat. 316, 421, 422, 4 L. ed. 579, 605. This power to preserve necessarily comes within the range of the express

power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, Sec. 8, par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. The Shreveport Case, 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g., Bank v. Supervisors, 7 Wall. 26, 31; Choate v. Trapp, 224 U. S. 665, 668, 669; Smith v. Kansas City Title & Trust Co., 255 U. S. 207; Trotter v. Tennessee, 290 U. S. 354, 356; Lawrence v. Shaw, 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI." 308 U. S., pp. 32–33.

The tax involved in this case is nondiscriminatory. It applies to all sales of goods, wares, or merchandise sold at retail in this State to consumers or users, except to the sales of tangible personal property which the State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of the State. But the taxes involved in the Crosland and Pittman cases were, also, nondiscriminatory. The
63 taxes involved there were laid generally upon the recording of all real estate mortgages. The tax involved here is a direct tax of two percent, upon the entire purchase price, to be paid by the purchaser. If sales within this State to a Federal Land Bank of tangible personal property which the Bank is required to purchase in carrying on the functions which Congress intended it should carry on within this State are subject to the sales tax, then the Federal Land Bank is required to pay a tax of two percent on all such purchases made by it. In the instant case the tax so imposed would amount to $8.02—the amount of the judgment rendered against the plaintiff Land Bank. As I construe the Federal Farm Loan Act, and the decisions of the Supreme Court of the United States interpreting and construing the same and analogous acts, the State is inhibited from laying this tax upon a Federal Land Bank, and the judgment against the plaintiff Bank should be reversed.

A. M. CHRISTIANSON.

64 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed May 12, 1941

The petition herein for a writ of certiorari to the Court of Court of the State of North Dakota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1941

No. —

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE FEDERAL LAND BANK OF ST. PAUL, PETITIONER

v.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA AND MOTION TO SUBSTITUTE

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BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

The Solicitor General, on behalf of The Federal Land Bank of St. Paul, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Dakota entered in the above case on March 17, 1941, affirming the judgment of the District Court of Burleigh County, North Dakota.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Supreme Court of North Dakota (R. 22) is reported in 297 N. W. 42.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of North Dakota sought to be reviewed was entered on March 17, 1941 (R. 20). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below denies a right and an immunity claimed by the petitioner under the Constitution and statutes of the United States.

The issue in this case is whether the Federal Land Bank of St. Paul, as a federal instrumentality, is liable in the purchase of lumber for the tax imposed by the Sales Tax Act of North Dakota upon the sale of personal property. The denial of its claim for immunity by the state courts plainly presents a federal question reviewable under Section 237 (b) of the Judicial Code. *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21.

The federal questions were specially set up and claimed by petitioner in its complaint filed in the District Court (R. 6, 8–9), in its specification of errors in the Supreme Court of North Dakota (R. 17–18), and were briefed and argued before that court. The grounds upon which it is contended that the questions are substantial are set forth in the Reasons for Granting the Writ, *infra*.

QUESTION PRESENTED

Whether the petitioner is subject to the Sales Tax Act of North Dakota.

STATUTES INVOLVED

The relevant provisions of the Federal Farm Loan Act (c. 245, 39 Stat. 360; 12 U. S. C. Secs. 641 *et seq.*) and of the Sales Tax Act of North Dakota (Laws 1937, c. 249) are reprinted in the Appendix.

STATEMENT

The petitioner, created under the Federal Farm Loan Act of July 17, 1916,[1] acquired three farm properties in Burleigh County, North Dakota, in the course of its farm mortgage lending business (R. 3). It was necessary for petitioner to purchase materials in order to repair and improve the buildings and fences located on these properties (R. 3). For this purpose it purchased lumber and other building materials, of an aggregate value of $408.26 from the Bismarck Lumber Company. The Lumber Company demanded a total of $8.02 from the petitioner, representing the amount of the state sales tax, which the petitioner refused to pay (R. 4–6).

The petitioner on March 9, 1938 filed a complaint in the District Court of Burleigh County against the Lumber Company and the Tax Commissioner

[1] On December 31, 1939, the Federal Land Bank of St. Paul had $55,501,940 of capital stock outstanding, of which 71.3 per cent was owned by the federal Government. *1939 Annual Report of the Farm Credit Administration*, p. 154.

of the State of North Dakota[2] (R. 2–10). It alleged the foregoing facts and prayed that the court adjudge that the petitioner is not liable for the sales tax (R. 9), because it is exempt under Section 26 of the Federal Farm Loan Act and the federal Constitution (R. 8–9). The respondents demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action (R. 11).

The court on May 6, 1938 sustained the demurrer (R. 12) and entered judgment against the petitioner in the amount of $8.02 (R. 12–13). The Supreme Court of North Dakota on appeal heard argument on June 14, 1938 and reargument on July 26, 1939 (R. 19–20). On March 17, 1941, it affirmed the judgment of the District Court (R. 20), with one judge dissenting (R. 39–46).

REASONS FOR GRANTING THE WRIT

The Supreme Court of North Dakota, as we read its opinion, placed its decision upon the following grounds: (1) The activities of the Federal Land Bank of St. Paul, except so far as it serves as a government depositary and as a purchaser of federal bonds, are proprietary not governmental (R. 27–33, 34–36). (2) Congress is without power to provide that the lending functions of the Federal Land Banks should be exempt from state taxation (R. 24–27, 33–34, 36–37). The court announced, as

[2] Owen T. Owen resigned the office of Tax Commissioner on December 26, 1938. A motion to substitute his successor, John Gray, who took office on May 18, 1939, is printed with this petition, *infra*, p. 9.

an alternative ground of its decision, that (3) Congress in Section 26 of the Farm Loan Act (a) was silent as to the liability of the Federal land banks for sales taxes, and (b) must be taken by its silence to have authorized the taxes in question. The first two propositions are in flat contradiction of decisions of this Court and each of the three is a question of first importance.

1. Whatever the case with respect to state activities, we had thought it settled that every constitutional activity of the United States is governmental rather than proprietary. *McCulloch* v. *Maryland*, 4 Wheat. 316, 432; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 158–159; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32; *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, No. 200, this Term, decided February 3, 1941. The contrary ruling of the court below is in patent conflict with these decisions.

2. So, too, it has been settled beyond doubt that Congress has power to prescribe immunity from state taxation "to protect the lawful activities of its agencies." *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 33; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 207. The ultimate question in any claim for tax immunity by a federal instrumentality is the intention of Congress. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 478–480. The contrary decision of the court below is plainly erroneous.

3. The alternative ground of the court below presents a question of major importance which has not yet been decided by this Court. Section 26 of the Federal Farm Loan Act, *infra*, provides:

> * * * every Federal land bank * * *, including the capital and reserve or surplus therein, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held * * * by said bank * * *.

The court below ruled that Section 26 did not include a sales tax within its provisions fixing either exemption from or liability for taxation. But it held, since Congress must have contemplated that the Federal Land Banks would purchase materials, that its failure to prescribe immunity must imply taxability. Contrary inferences are, however, more reasonably to be drawn from Section 26: (a) Section 26 is not silent. The North Dakota sales tax is imposed on the buyer (R. 23); *Jewel Tea Co.* v. *State Tax Commissioner*, 293 N. W. 386, 389, 391. Section 26 exempts "every federal land bank" and would seem therefore to immunize the petitioner from taxes imposed upon it. (b) Even if Section 26 were considered not in terms to deal with sales taxes, the specific exception of real estate, cutting off so narrow a field from the general exemption of capital, surplus and income, implies that taxes falling within neither enumeration are not to be imposed.

Many statutes creating government corporations which have been enacted since the Federal Farm Loan Act have followed the general pattern of Section 26 in dealing with tax exemption.[3] Whether they are exempt from or liable to state sales taxes is a question which has frequently recurred and should be considered by this Court.

4. This case may also present for decision the extent to which a state sales tax may be applied to the transactions of the United States. See *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Graves* v. *Texas Co.*, 298 U. S. 393; cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134. (a) If respondents should urge, and if this Court should agree, that a sales tax is valid even when imposed upon the United States itself, it might be that Section 26 was intended to confer no greater immunity upon the Federal Land Banks. (b) If the Court should agree with the Supreme Court of North Dakota that Congress in Section 26 was silent as to sales

[3] Federal Reserve Act, c. 6, Sec. 7, 38 Stat. 251, 258; Federal Farm Loan Act, c. 245, Sec. 26, 39 Stat. 360, 380; Reconstruction Finance Corporation Act, c. 8, Sec. 610, 47 Stat. 5; Federal Home Loan Bank Act, c. 522, Sec. 13, 47 Stat. 725, 735, as amended by Act of May 28, 1935, c. 150, Sec. 8, 49 Stat. 293, 295; Act creating Federal Deposit Insurance Corporation, c. 89, Sec. 8 (Sec. 12B (p)), 48 Stat. 162, 177, as amended by Section 101 of the Banking Act of 1935, c. 614, 49 Stat. 684, 696, 700; Farm Credit Act of 1933, creating the Central Bank for Cooperatives, the Production Credit Corporation, Production Credit Associations, and Banks for Cooperatives, c. 98, Sec. 63, 48 Stat. 257, 267; National Housing Act, c. 847, Sec. 402, 48 Stat. 1246, 1256.

taxes, we think that the federal instrumentality is in that case intended to have the immunity which attaches to the operation of the United States.[4] The question is one which should definitely be settled.

CONCLUSION

The decision below raises a number of highly important questions which should be considered by this Court. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MAY, 1941.

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[4] In *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, No. 200, this Term, decided February 3, 1941, the Court rejected an analogous argument as to the incidents of suit, but it did so because of the implications of the unqualified "sue-and-be-sued clause". There is no corresponding tax clause in the Federal Farm Loan Act, or in the other statutes cited in note 3, *supra*.

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v.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

MOTION TO SUBSTITUTE JOHN GRAY AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

Owen T. Owen, then Tax Commissioner of the State of North Dakota, was joined as a party defendant to this case (R. 3, 10). We are advised that he resigned from this office on December 26, 1938, and that John Gray was appointed his successor on May 18, 1939, and continues to hold this office. The Attorney General of North Dakota has advised us that he consents to this substitution.

The Solicitor General therefore moves, if this Court should grant the petition for a writ of certiorari submitted herewith, that John Gray be substituted as the respondent Tax Commissioner of the State of North Dakota in place of Owen T. Owen.

FRANCIS BIDDLE,
Solicitor General.

MAY 1941

APPENDIX

Federal Farm Loan Act of July 17, 1916 (c. 245, 39 Stat. 360; 12 U. S. C. Sec. 931):

SEC. 26. That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

North Dakota Laws of 1937, c. 249:

§ 1. DEFINITIONS. The following words, terms and phrases, when used in this Act, have the meanings ascribed to them in this Section, except where the context clearly indicated a different meaning:

(a) "Person" includes any individual, firm, co-partnership, joint adventure, association, corporation, the State of North Dakota and any of its sub-divisions, departments or institutions, any County, City, Village, Township, School District, Park District, Municipal Corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit, and the plural as well as the singular number.

* * * * *

(d) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

* * * * *

(g) "Relief agency" means the State, any County, City and County, City or District thereof, or any agency engaged in actual relief work.

* * * * *

§ 2. TAX IMPOSED. There is hereby imposed, beginning the first day of May, 1937, and ending June 30th, 1939,[1] a tax of two per

[1] Laws of 1939, c. 234, Sec. 1, amends Section 2 of the 1937 Act to extend the tax through June 30, 1941.

cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of steam, gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing steam, gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this Act, when sold at retail in the State of North Dakota to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this Act.

The tax herein levied shall be computed and collected as hereinafter provided.

§ 3. EXEMPTIONS. There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

* * * * *

§ 5. CREDIT TO RELIEF AGENCY AND LOCAL GOVERNMENTAL UNITS.

(1) A relief agency may apply to the Commissioner for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares, or merchandise

used for free distribution to the poor and needy;

* * * * *

§ 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

Agreements between competing retailers, or the adoption of appropriate rules and regulations by organizations or associations of retailers to provide uniform methods for adding such tax or the average equivalent thereof, and which do not involve price fixing agreements otherwise unlawful, and which shall first have the approval of the Commissioner, are expressly authorized and shall be held not to be in violation of any anti-trust laws of this State.

§ 7. UNLAWFUL ACTS. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

* * * * *

§ 10. PAYMENT OF TAX. BOND. CREATION OF LIEN.

(1) The tax levied hereunder shall be due and payable in quarterly installments on or before the 20th day of the month next succeeding each quarterly period, the first of such period being the period commencing

with May 1, 1937, and ending on the 30th day of June, 1937.

(2) Every retailer, at the time of making the return required hereunder, shall compute and pay to the Commissioner the tax due for the preceding period.

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v.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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M. G. West Co. v. *Johnson*, 20 Cal. App. (2d) 95, certiorari denied, 302 U. S. 638 . . . . . 35, 43, 75
Western Lithograph Co. v. *State Board of Equalization*, 11 Cal. (2d) 156 . . . . . 35, 75
Weston v. *City Council of Charleston*, 2 Pet. 449 49

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Act creating Federal Intermediate Credit Banks, 42 Stat. 1454, sec. 210 21
Act creating Reconstruction Finance Corporation, 47 Stat. 5, sec. 10 . . . . . 5, 21, 22
Act creating Federal Home Loan Banks, 47 Stat. 725, sec. 13 21
Act creating Home Owners' Loan Corporation, 48 Stat. 128, sec. 4 (c) 21
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Act creating Central Bank for Cooperatives, Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, 48 Stat. 257, sec. 63 (12 U. S. C. 1138c) 19, 21, 26
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Act creating Federal Savings and Loan Insurance Corporation, 48 Stat. 1246, sec. 402 (e) 21
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Farm Credit Administration, Eighth Annual Report (1940) 29, 30, 32
Farrand, Records of the Federal Convention:
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H. Rpt. No. 279, 73d Cong., 1st sess., p. 4 21
H. Rpt. No. 1922, 73d Cong., 2d sess., p. 4 22
H. Rpt. No. 1995, 74th Cong., 2d sess., pp. 1–2 22
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H. Rpt. No. 514, 77th Cong., 1st sess., p. 2 24
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S. Rpt. No. 144, 64th Cong., 1st sess., pp. 7, 9, 10 30
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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 76

THE FEDERAL LAND BANK OF ST. PAUL, PETITIONER

v.

BISMARCK LUMBER COMPANY, AND JOHN GRAY, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BRIEF FOR THE PETITIONER

OPINION BELOW

The District Court of Burleigh County wrote no opinion. The opinion of the Supreme Court of North Dakota (R. 22) is reported in 297 N. W. 42.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on March 17, 1941 (R. 20). The petition for a writ of certiorari was filed on May 9, 1941, and was granted on May 26, 1941 (R. 47). The jurisdiction of this Court rests on

Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is subject to the Sales Tax Act of North Dakota.

STATUTES INVOLVED

The relevant provisions of the Federal Farm Loan Act (39 Stat. 360; 12 U. S. C. secs. 641 *et seq.*) and of the Sales Tax Act of North Dakota (Laws 1937, c. 249) are reprinted in Appendix A, *infra*, pp. 54–67.

STATEMENT

The petitioner, created under the Federal Farm Loan Act of July 17, 1916, acquired three farm properties in Burleigh County, North Dakota, in the course of its farm mortgage lending business (R. 3). It was necessary for petitioner to purchase materials in order to repair and improve the buildings and fences located on these properties (R. 3). For this purpose it purchased lumber and other building materials, of an aggregate value of $408.26 from the Bismarck Lumber Company. The Lumber Company demanded a total of $8.02 from the petitioner, representing the amount of the state sales tax, which the petitioner refused to pay (R. 4–6).

The petitioner on March 9, 1938, filed a complaint in the District Court of Burleigh County against

the Lumber Company and the Tax Commissioner of the State of North Dakota[1] (R. 2–10). It alleged the foregoing facts and prayed that the court adjudge that the petitioner is not liable for the sales tax (R. 9), because it is exempt under section 26 of the Federal Farm Loan Act and the federal Constitution (R. 8–9). The respondents demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action (R. 11).

The court on May 6, 1938, sustained the demurrer (R. 12) and entered judgment against the petitioner in the amount of $8.02 (R. 12–13). The Supreme Court of North Dakota on appeal heard argument on June 14, 1938, and reargument on July 26, 1939 (R. 19–20). On March 17, 1941, it affirmed the judgment of the District Court (R. 20), with one judge dissenting (R. 39–46).

SPECIFICATION OF ERRORS

The Supreme Court of North Dakota erred:

1. In holding that the lending functions of petitioner were proprietary or non-essential functions.

2. In holding that the lending functions of petitioner were additional and unrelated to its governmental functions.

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[1] Owen T. Owen was named as the original defendant. He resigned the office of Tax Commissioner on December 26, 1938. His successor, John Gray, who took office on May 18, 1939, was substituted by order of this Court on May 26, 1941.

3. In holding that Congress had no constitutional power to provide that petitioner's lending functions should be exempt from state taxation.

4. In holding that the North Dakota sales tax was applicable to petitioner notwithstanding the exemption provided in section 26 of the Federal Farm Loan Act, and notwithstanding the implications of the federal Constitution.

5. In holding, in the alternative, that section 26 of that Act did not exempt petitioner from the state sales tax.

6. In holding the North Dakota sales tax applicable to the purchases made by petitioner.

7. In affirming the judgment of the District Court of Burleigh County, North Dakota.

SUMMARY OF ARGUMENT

I

A. The North Dakota sales tax is collected from the seller but is imposed upon the purchaser. Section 6 requires that the retailers add the sales tax to their price, and section 7 makes it unlawful for the seller to hold out that he has absorbed any part of the tax burden. The Supreme Court of North Dakota has twice ruled that the sales tax is laid upon the purchaser. *Jewel Tea Co.* v. *State Tax Commission,* 293 N. W. 386; R. 23. When the state decision follows the provisions of the act, as here, it is controlling. *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52.

B. Since the North Dakota sales tax is imposed upon the purchaser, the petitioner is exempt from the tax in making its purchases. (1) This would be the case even had Congress been silent; but instead it affirmatively provided immunity. (2) Section 26 of the Federal Farm Loan Act provides exemption for "every Federal land bank", and thus recites all taxes imposed upon the banks themselves. (3) The text is confirmed by the structure. The broad exemption of "every Federal land bank" is not narrowed by the specific illustrations of capital, reserve, and income, for these are enumerated simply as included within the general exemption. If the exemption were not one of general application, there would have been no occasion in section 26 to except from the tax exemption real estate held by the banks.

(4) The legislative history of similar tax exemption clauses offers support to our construction. The history of section 10 of the Reconstruction Finance Corporation Act, in particular, affords a quite clear indication of the congressional intention. Congress moved promptly to avoid the effect of this court's decision (*Baltimore Nat. Bank* v. *Tax Comm'n,* 297 U. S. 209) that the Reconstruction Finance Corporation was taxable on its national bank shares; the committee reports explain that section 10 "was intended to give as wide immunity as possible to the functions and activities of the corporation." Section 10 of the Reconstruction Finance Corporation Act was again amended

on June 10, 1941, to insure that the tax exemption applied not only to the Reconstruction Finance Corporation but also to its subsidiary or controlled corporations; the Act provided that the tax exemption "(which shall, for all purposes, be deemed to include sales * * * taxes) shall be construed to be applicable" to the subsidiary corporations. The committee reports make it plain that Congress by this declaration sought only to confirm its original understanding of the exemption.

(5) If the construction of section 26 were otherwise doubtful, it might be argued that the court should attempt to decide whether the immunity from sales taxes is wise, and thus attempt to arrive at the probable legislative intention. Apart from the inevitable hazards of such an approach to statutory construction, one must conclude that the Congress of 1916 would more probably than not have intended an exemption from sales taxes. The federal land bank system was designed to advance credit to farm borrowers at the lowest possible rate. To hold this rate down to the minimum, Congress was willing to sacrifice state tax revenues. This prescription of immunity does not result in private benefit; at this time the Government owns a substantial part of the federal land bank stock, and the remainder is held by borrowers. Any reduction in expense thus serves automatically to reduce the interest rate upon borrowing.

(6) The various feredal agencies operating under similar tax exemption clauses have uni-

formly construed these as exempting the agency from sales taxes imposed upon the purchaser. The state courts and tax officials, however, have not been equally consistent in their treatment of the question.

II

A. It is wholly clear, both on principle and on authority, that the lending functions of the federal land banks are "governmental" in nature. Whatever the philosophic adequacy of the "proprietary function" limitation upon tax immunity, it has never been applied to the functions of the federal government. That government can exercise only powers which are delegated to it by the Constitution. If constitutional, the exercise of power must by definition be governmental. Any other rule would result in a catastrophic practical impairment of the federal functions. Accordingly, the Court in its earliest as in its latest decisions in tax immunity litigation has emphasized that every federal activity under the delegated powers is governmental in nature. *McCulloch* v. *Maryland*, 4 Wheat. 316, 432; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32.

B. (1) Several decisions of this court have squarely held that Congress has constitutional power to prescribe tax immunity for the lending functions of federal credit agencies. *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Federal Land*

Bank v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21. These decisions are conclusive. They did not deal with sales taxes but, so long as those taxes are equally included within the reach of section 26, there is no room for speculation as to whether the immunity from one type of taxes as contrasted with another is wise. *Pittman* v. *Home Owners' Corp.*, *supra*, 33.

(2) These decisions rest upon elementary principles of constitutional theory. Article VI, establishing the acts of Congress as the supreme law of the land, was enacted in consequence of a basic postulate of a federated system, that the national government is composed of representatives of the state governments, while it has no representation in the local legislatures. This Court has specifically noted that Congress may be expected to legislate in recognition of the states' need for tax revenues, while the converse is not necessarily true. *McCulloch* v. *Maryland*, *supra*, 435–436; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412–413, 416–417. For the first half century of tax immunity litigation, the decisions turned exclusively upon the supremacy clause of Article VI. Even after *The Collector* v. *Day*, 11 Wall. 113, the Court has frequently recurred to this specific basis of tax immunity. Many cases have recognized the power of Congress to waive an immunity which otherwise would attach to federal instrumentalities; other cases have held the taxpayer liable simply because Congress

had failed to provide immunity; and the Court in a number of other cases has extended immunity from state taxes only, or in part, because Congress had so provided. Necessarily, then, the tax immunity of the United States and its instrumentalities is in the ordinary case a question simply of congressional intent. That question is set at rest by section 26 of the Federal Farm Loan Act.

ARGUMENT

I

SECTION 26 OF THE FEDERAL FARM LOAN ACT EXEMPTS PETITIONER FROM THE NORTH DAKOTA SALES TAX

A. THE TAX IS LAID ON THE PETITIONER

The petitioner purchased lumber and other building materials from the respondent Lumber Company, which demanded $8.02 from the petitioner in payment of the North Dakota sales tax. This tax is imposed by c. 249 of N. D. Laws of 1937, *infra*.[1] The terms of the act and the decisions of the Supreme Court of North Dakota alike show that the purchaser is the one upon whom the sales tax is imposed.

Section 2 imposes a tax of two percent "upon the gross receipts from all sales of tangible personal

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[1] As originally enacted, Section 2 limited the life of the tax until June 30, 1939. By successive amendments, however, the period has been extended until June 30, 1943. Laws of 1939, c. 234, Sec. 1; S. B. No. 40, approved March 14, 1941.

property * * * sold at retail in the State of North Dakota to consumers or users." The retailer is without doubt the immediate taxpayer and the one to whom the state looks for its collection.[2] But his function, under the statute, is not that of a taxpayer who may meet his obligation as he chooses. The retailer must collect the tax from his customers and then pay it over to the state.

This duty does not arise from economic forces. It is compelled by law. Section 6 of the Act provides:

> Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

Its effect is reinforced by section 7, which provides:

> It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this

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[2] The retailer must keep records of his sales. Sec. 8. He shall file quarterly tax returns. Sec. 9. He shall pay the tax indicated by the return. Sec. 10. A lien for unpaid taxes is imposed upon his property. Sec. 10 (4). He is liable for penalties for failure to file a return or pay the tax. Sec. 15. Refunds of overpayments are to be made to the retailer. Secs. 13, 22.

> Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

These sections, then, require that the retailer add the amount of the tax to his selling price and make it unlawful [3] for him to state that any part of the tax has been absorbed by him.

The North Dakota legislature insured that the retailer need not meet the tax burden intended for the consumer through two further provisions. Section 4 provides for the credit of taxes paid on sales represented by accounts found to be worthless and charged off, while section 1 (f) excludes, from the measure of the tax, discounts, refunds made upon the return of the goods sold, and future instalments under conditional sales contracts.

The retailer must pay the tax to the State but, correlatively, he must collect it from the purchaser. The legislature, accordingly, contemplated that the tax would be laid upon the purchaser, and that the retailer was simply a collector who would remit the tax to the State. It is unnecessary in this case to explore the economic incidence of a sales tax, or to speculate as to where the burden will fall. Cf. Mr. Justice Stone, dissenting in *Indian*

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[3] Section 15 (2) provides a penalty of $1,000 or imprisonment for one year, or both, for violation of Section 7.

Motocycle Co. v. *United States,* 283 U. S. 570, 581. For the North Dakota legislature has by law insured that the duty of paying the tax will be placed upon the purchaser, and that the amount of the tax will be collected as such from the purchaser.

The Supreme Court of North Dakota has so ruled. In *Jewel Tea Co.* v. *State Tax Commission,* 293 N. W. 386 (July 30, 1940), the court held the sales tax applicable to goods shipped in interstate commerce and thereafter sold within the state by the Tea Company. The decision was placed squarely on the ground that the tax was imposed upon the purchaser and not upon the seller.[4] It said (293 N. W. at 389) that "what the plaintiff is required to do is to collect the tax and remit." Under sections 6 and 7, "it is the consumer who pays the tax," and "this tax is laid primarily upon the consumer." The seller, the court continues, is not "burdened by imposition of the tax on the consumer," and the tax machinery is directed at the seller only because "in order to insure collection of this tax, resort is had to the records of the retailer." The ruling of the *Jewel Tea* case has not been qualified and, indeed, has been reaffirmed in the case at bar. The opinion below states in terms that the sales tax "is required to be paid by the buyer" (R. 23). These

[4] We do not suggest that the commerce clause would invalidate a sales tax imposed upon the seller under the circumstances of the *Jewel Tea* case. But the excessive caution of the premise from which the North Dakota court approached the commerce clause question does not weaken the force of its decision as to the effect of the North Dakota sales tax.

decisions of the North Dakota court are entitled to great weight in the analysis of the North Dakota sales tax statute in order to determine who is the real taxpayer. *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52.[5]

This Court in several cases has made the same ruling with respect to substantially similar taxes. In *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 43, it held, as to the New York City sales tax, that "the ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, * * * and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him." The New York City Tax contains sanctions against the purchaser which are lacking in the North Dakota tax,[6]

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[5] Whether section 26 of the Federal Farm Loan Act immunizes petitioner from the North Dakota sales tax is, of course, a federal question. If, as we suggest at this point, this federal issue turns upon the legal incidence of the tax, this Court is not controlled by the characterizations or conclusions of the state court. See *Heiner* v. *Mellon,* 304 U. S. 271, 279; *Lyeth* v. *Hoey,* 305 U. S. 188, 193-194; *Morgan* v. *Commissioner,* 309 U. S. 78, 81; *United States* v. *Pelzer,* 312 U. S. 399. But the decisions of the state court are entitled to much weight in the inquiry as to how the state statute actually operates, and upon whom the tax burden was intended to be placed by the state legislature.

[6] Section 2 provides that the tax "shall be paid by the purchaser to the vendor, for and on account of the City of of New York," and requires the buyer to pay the tax to the City if it has not been collected by the seller. 309 U. S. at 43.

but these are immaterial, as shown by *Colorado Bank* v. *Bedford*, 310 U. S. 41. There the Colorado tax on services, including safety-vault services, set up relationships between the seller, the buyer, and the tax collector which are not markedly different from those under the North Dakota sales tax.[7] The Court assumed that taxation of the national bank would be forbidden, but held that "the tax is upon the user of the safe-deposit boxes, not upon the bank" (310 U. S. at 51). The Court, in reaching this conclusion, noted that the real taxpayer "is the person ultimately liable for the tax itself" (Cf. *Stahmann* v. *Vidal*, 305 U. S. 61) and that "the funds which were received by the State came from the assets of the user, not from those of" the bank (310 U. S. at 52).[8]

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[7] The person rendering the services is liable for payment of the tax. He is required as far as practicable to add the tax to the value of the services, showing it as a separate item, and the tax shall be a debt to him from the user; the seller is forbidden to hold out that he has absorbed the amount of the tax. Sec. 6. Credit is given the seller for taxes paid on accounts which become worthless. Sec. 2 (h). The user, however, may recover illegally collected taxes. Sec. 7. Amounts paid by the user as taxes are public funds of the State. Sec. 12. 310 U. S. at 44, 45. The last two provisions are not found in the North Dakota tax, but section 7 was not relied upon at all by this Court and section 12 was not given controlling weight. See 310 U. S. at 51, 52.

[8] These decisions are not qualified by *City of New York* v. *Feiring*, No. 863, October Term, 1940. That case held that the seller's obligation to pay over the New York City sales taxes collected by him was a "tax" and so entitled to priority under Section 64 of the Bankruptcy Act.

The terms of the North Dakota sales tax act, the decisions of the Supreme Court of North Dakota, and the analogic decisions of this Court alike require the conclusion that the sales tax is imposed upon the buyer and not upon the seller, who acts simply as collecting agent for the State. It follows that the real taxpayer in this case is the petitioner and not the respondent Lumber Company.

B. THE TERMS AND THE HISTORY OF SECTION 26 REQUIRE THE EXEMPTION OF THE PETITIONER FROM THE STATE SALES TAX

The Supreme Court of North Dakota, although recognizing that the sales tax was laid upon the petitioner, ruled as an alternative ground of its decision that section 26 of the Federal Farm Loan Act did not exempt the petitioner (R. 37–39). Its decision seems to have been placed upon the ground that section 26 contained a few specific exemptions and accordingly authorized the imposition of all other taxes. The decision both mistakes the function of the tax clause and misreads the provisions of section 26.

1. *The Role of the Tax Clause.* The federal land bank system, as we show below (pp. 28–33), is to be considered a part of the federal government. When the North Dakota sales tax is applied to petitioner's transactions, it is imposed on petitioner, and thus on the Government itself.

One proposition in the field of tax immunity litigation is wholly clear; it is that, in the absence of congressional consent, the states may not tax the federal government itself.[9] *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151; *Clallam County* v. *United States*, 263 U. S. 341; *New Brunswick* v. *United States*, 276 U. S. 547; see *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738; *United States* v. *Railroad Company*, 17 Wall. 322. Accordingly, if Congress were entirely silent, as the court below at one point suggests (R. 38), petitioner would yet be exempt from taxes imposed on it and would share the immunity of the United States. That immunity, as we argue in *Alabama* v. *King & Boozer*, No. —, this Term, excludes sales taxes which are by law laid upon the United States.

If, therefore, petitioner were to be held liable for the North Dakota sales tax, it would be necessary to find at last an implied waiver by Congress of petitioner's immunity. It is unnecessary to elaborate this proposition, for not only is there no waiver but, on the contrary, Congress has affirmatively provided that petitioner shall be exempt from state taxation.

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[9] The argument is developed in more detail in the Government's brief in *Pittman* v. *Home Owners Loan Corporation*, No. 10, October Term, 1939, pp. 44–49.

2. *Section 26 in Terms Exempts the Petitioner.* Section 26 of the Federal Farm Loan Act, *infra*, provides in part:

> That every Federal land bank * * *, shall be exempt from Federal, State, municipal, and local taxation.

The section exempts from state taxation "every Federal land bank." As we have shown, the North Dakota sales tax is laid upon the buyer. It follows that petitioner, in purchasing materials in North Dakota, is exempt under the Federal Farm Loan Act from the state sales tax.

3. *Section 26 as a Whole Exempts the Petitioner.* The conclusion that sales taxes laid upon the purchaser are included within the express exemption from taxes imposed upon a federal land bank is confirmed by consideration of section 26 as a whole. It provides:

> That every Federal land bank * * *, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held * * * by said bank * * *. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds * * * and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

> Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner * * * subject to the conditions and limitations contained in Section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

The tax exemption created by section 26 is a broad immunity from every tax imposed upon a federal land bank, and is not limited to the specific illustrations given in the section. Textually, the section exempts from taxation the land banks, and the enumeration of capital, surplus and income are merely stated to be included within that broad exemption.[10] The term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle. *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 125; *Phelps-Dodge Corp.* v. *Labor Board*, No. 387, October Term, 1940.

The wording of the section is confirmed by the structure. If the broad exemption of "every Federal land bank" were confined to the subsequent specific illustrations, there would be no occasion to

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[10] In *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 479, the opinion describes the similarly worded exemption of the H. O. L. C. as follows: "The corporation *itself*, 'including its franchise * * *,' is likewise exempted from taxation" [Italics added].

except from the tax exemption real estate held by the banks.[11]

The contrary view of the court below has startling implications. The cash and bank accounts held by the federal land banks, their office fixtures, their security transactions, are all accepted as exempt from taxation. The exemption, if it be found in section 26, must rest on the exemption of the federal land bank itself. Certainly, it is doubtful that Congress would choose to exempt from taxation the capital, surplus, and income of federal land banks and yet leave them subject to all other forms of taxation.

It is true that subsequent clauses specifically provide immunity for the bonds and mortgages of federal and joint-stock land banks. But the bonds would be held by private persons, and the mortgages held by joint-stock land banks would not be within the general exemption of federal land banks. Mortgages actually held by the federal land banks would be covered by the general exemption from taxation, but the specific exemption is of mortgages *executed* to the land banks. Their value as security and their attractiveness on sale would be im-

[11] Similarly, when Congress intended that the tangible personal property of the Production Credit organizations and the Banks for Cooperatives should be subject to taxation, the exception of real estate in a similar exemption section was expanded to include tangible personal property. Sec. 63, 48 Stat. 257, 267; 12 U. S. C. 1138c.

paired if the tax exemption vanished upon transfer by the land banks. See VIII–I Cum. Bull. 69; XIII–2 Cum. Bull. 47. Accordingly, the subsequent clauses of section 26 are not even tautologous, much less indicative of a legislative intent to qualify the broad and unequivocal exemption of "every Federal land bank."

The Supreme Court of North Dakota, however, suggests (R. 38) an alternative approach. The building materials purchased from respondent Lumber Company are to be used on petitioner's real estate; the inference seems to be that the sales tax is permitted as a tax "upon real estate held * * * by said bank." But, whatever the final use of the building materials, the tax on their sale is quite obviously not a tax on real estate.

Since, therefore, the North Dakota sales tax is laid upon the buyer, the petitioner in its purchases is exempt by section 26. This conclusion is required both by the text of the section and by the fact that it carves a narrow exception, real estate taxes, out of a broad and inclusive exemption from taxes imposed upon the federal land banks.

4. *The Legislative History of Similar Provisions Indicates that an Exemption from Sales Taxes was Intended.* The tax exemption clause of the Federal Farm Loan Act does not differ substantially from

that found in a number of other statutes.[12] Such light as the committee reports on these statutes throw indicates that the tax exemption clause was intended to exempt the federal instrumentality from sales taxes. The Committee reporting the Federal Reserve Act, in which the standard clause first appeared, stated (H. Rpt. No. 69, 63d Cong., 1st Sess., p. 39) that the federal reserve banks were exempted "from *all classes* of taxation, save such taxation as may be imposed upon the real estate held by these banks." [Italics added.] The House report on the bill creating the Federal Farm Mortgage Corporation similarly declares (H. Rpt. No. 279, 73d Cong., 2d Sess., p. 4) that "the Corporation shall be exempt from taxes except real-property taxes." The report on the bill creating the Federal Savings and Loan Insurance Corpora-

[12] The acts creating: Federal Reserve Banks, sec. 7, 38 Stat. 251, 258; Federal Intermediate Credit Banks, sec. 210, 42 Stat. 1454, 1459; Reconstruction Finance Corporation, sec. 10, 47 Stat. 5, 9; Federal Home Loan Banks, sec. 13, 47 Stat. 725, 735; Home Owners' Loan Corporation, sec. 4 (c), 48 Stat. 128, 129; Federal Deposit Insurance Corporation, sec. 8 [12B (p)], 48 Stat. 162, 177, as amended by sec. 101 of the Banking Act of 1935, 49 Stat. 684, 709; Federal Farm Mortgage Corporation, sec. 12, 48 Stat. 344, 347; Central Bank for Cooperatives, Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, sec. 63, 48 Stat. 257, 267; Federal Savings and Loan Insurance Corporation, sec. 402 (e), 48 Stat. 1246, 1257; Farmers' Home Corporation, sec. 40 (i), 50 Stat. 522, 528; United States Housing Authority, sec. 5 (e), 50 Stat. 888, 890; Federal Crop Insurance Corporation, sec. 511, 52 Stat. 31, 72, 75.

tion is similarly worded. H. Rpt. No. 1922, 73d Cong., 2d Sess., p. 4.

The implications of this fragmentary legislative history receive specific confirmation from the subsequent legislative history of section 10 of the Reconstruction Finance Corporation Act, 47 Stat. 9. That section [13] is substantially identical with section 26 of the Federal Farm Loan Act. In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, this Court held the R. F. C. liable to state taxation on its national bank shares because section 5219 of the Revised Statutes provided that *all* shares of national banks could be taxed. Six weeks later, by the Act of March 20, 1936 (49 Stat. 1185; 12 U. S. C. Supp. V, sec. 51d), Congress amended, not the Reconstruction Finance Corporation Act, but the Acts relating to national banks, to exempt the R. F. C. from all such taxation, whether past or future. The Committee reports are completely explicit as to the Congressional understanding of the scope of the exemption intended by provisions such as that now under question. The House Committee on Banking and Currency said (H. Rpt. No. 1995, 74th Cong., 2d Sess., pp. 1–2):

> Section 10 has generally been understood to assert the broadest possible immunity from

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[13] It provides in part: "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation * * *; except that any real property of the corporation shall be subject to State * * * or local taxation to the same extent according to its value as other real property is taxed."

> the burden of taxation for the Corporation, its assets and its operations. This construction follows from the language of the section which confers tax exemption upon "the Corporation", while specifically consenting to the taxation of real property alone. This construction follows also from the material impairment of the Corporation's operation and effectiveness by any burden of State and Federal taxation, for in furtherance of its purposes the corporation has kept its charges at the lowest rates consistent with sound financing.
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> * * * * *
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> The committee feels that when Congress enacted section 10 of the Reconstruction Finance Corporation Act, it was intended to give as wide immunity as possible to the functions and activities of the Corporation, and the enactment of the proposed bill will accomplish that intention.

To the same effect, see H. Rpt. No. 2199, 74th Cong., 2d Sess.; S. Rpt. No. 1545, 74th Cong., 2d Sess.

Section 10 of the Reconstruction Finance Corporation Act was again amended on June 10, 1941, by Pub. No. 108, 77th Cong., 1st sess. Section 3 (b) of that Act adds the following to the end of section 10:

> The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with

> respect to the Reconstruction Finance Corporation but also with respect to * * * [corporations organized or created or financed and managed by the R. F. C.].

This is a clear declaration by Congress that the standard tax exemption provision was intended to include sales taxes within the general tax exemption of "the Corporation", or "every Federal land bank."

The legislative history of Pub. No. 108 explains its enactment. The House Report (H. Rpt. No. 514, 77th Cong., 1st Sess., p. 2) states:

> This section of the bill reaffirms the policy of the Congress with respect to such exemptions, making it clear (1) that the exemption extends to sales taxes, use taxes, and all other taxes except those expressly excepted under existing law, and (2) that the exemption applies to the loans and personal property of the Corporation.

The Senate Report (S. Rpt. No. 292, 77th Cong., 1st Sess., p. 2) contains practically identical language. The House members in charge of the bill stated that "This section does no more * * * than reaffirm the original intention of the Congress,"[14] and that "This is an attempt simply to state the existing situation, to clarify the present law * * *."[15] Senator Brown, in charge of

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[14] Mr. Steagall, 87 Cong. Rec. 4616 (pamph.).

[15] Mr. Williams, 87 Cong. Rec. 4628–4629 (pamph.). See also 87 Cong. Rec. 4626, 4628 (pamph.).

the bill, stated on the floor of the Senate that the effect of the bill was that "the Reconstruction Finance Corporation and its creatures are granted the same immunity that the Government itself has. * * * I am satisfied that the pending bill does not extend the principle which has been followed in the past." [16]

Congress, of course, will not be supposed to intend a retroactive amendment of an older statute by a declaration of the legislative intention. *Haggar Co.* v. *Helvering*, 308 U. S. 389, 400. But where there is doubt as to the meaning of the statute, subsequent legislative clarification is to be given controlling weight. See *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 468–469; *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, 322; cf. *United States* v. *The Cooper Corporation*, 312 U. S. 600. Here the clarification simply reinforces the plain meaning of the original language.

This legislation is to be contrasted with Public No. 7, 77th Cong., 1st sess. approved on February

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[16] 87 Cong. Rec. 4255–4256 (pamph.). Senator Brown's remarks in full text include the following: "I think Senators have confidence that I would not approve any bill which would extend or expand governmental tax immunity. * * * I myself am not in complete agreement with all that is provided in this section relative to tax exemption. * * * I am satisfied that the pending bill does not extend the principle which has been followed in the past." (*Id.*) The statements are harmonized on the assumption that the Senator believes that Congress should restrict the immunity which has been granted in the past.

19, 1941. Section 4 (a) of that Act provides that interest or gain on subsequently issued securities of the United States, or any agency or instrumentality thereof, shall be subject to the federal income tax.[17] This narrowing of immunity of the private persons who deal with the Government, it is to be noted, occurred in the same Congress which declared that section 10 of the Reconstruction Finance Corporation Act was intended to exempt the Corporation from sales taxes on its purchases. The difference in result underscores the difference in congressional attitude between taxes imposed upon private persons and those laid upon the Government itself.[18]

This contrast in congressional attitude is reflected, also, in the so-called Buck amendment of October 9, 1940, which authorizes state taxation of sales made on federal reservations to private persons, but excludes from this authorization sales made to or by the United States or its instrumentalities. Secs. 3 (a), 6 (b), Pub. No. 819, 76th

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[17] The Committee reports on Public No. 7 explain the desirability of removing the exemptions of bond interest because they favor the bond purchasers with large incomes. H. Rpt. No. 20, 77th Cong., 1st Sess., p. 3; S. Rpt. No. 11, 77th Cong., 1st Sess., pp. 3-4.

[18] Compare section 63 of the Act of June 16, 1933 (48 Stat. 257, 267), providing that the exemption of the Production Credit Associations, of the Central Bank for Cooperatives, of the Production Credit Corporations, and of the Banks for Cooperatives, should be eliminated after the Government stock was retired.

Cong., 3d Sess.[19] It is quite unlikely that Congress, avowedly seeking to remove tax exemptions based on residence in a federal reservation, would have denied its consent to tax sales to federal instrumentalities if it had believed that a large group, those agencies operating under the standard tax exemption clause, were normally subject to state sales taxes.

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[19] Sec. 3 (a) provides that the Act "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or * * * with respect to sale * * * by the United States or any instrumentality thereof * * *." Sec. 6 (b) excepts from Public No. 819 the authority to impose gasoline taxes on federal reservations which had already been granted by section 10 of the Act of June 16, 1936, 49 Stat. 1519; that section authorizes the imposition of gasoline sales taxes "when such fuels are not for the exclusive use of the United States." The committee reports make plain that the authority to tax does not extend to sales to the United States. One report of the Senate Committee states that "This bill will not permit the collection of a State sales tax with respect to purchases made by the Federal Government in the exercise of an essential governmental function * * *." S. Rpt. 1028, 76th Cong., 1st sess., pp. 1–2. Another points out that no tax may be collected from the United States or any instrumentality thereof and, *also*, that no tax may be imposed on sales *by* the United States or its instrumentality; it notes that the authority is continued to tax gasoline sold in federal areas "for private purposes." S. Rpt. No. 1625, 76th Cong., 3d sess., pp. 3–4. The House report, and the quoted letter from the Secretary of Treasury, each note that no authority is given to levy taxes which would otherwise be constitutionally forbidden. H. Rpt. No. 1267, 76th Cong., 1st sess., pp. 2–3.

5. *The Petitioner's Functions are such that Congress must have intended an Exemption.* We may concede that the construction of a doubtful tax exemption section may be influenced by the constitution and the functions of the federal agency to which it applies. By deciding whether or not tax immunity is wise the Court might hope that it had duplicated the probable legislative intention. This approach to statutory construction is hazardous in its nature; and we think it plain that there is no such doubt as to the meaning of section 26 as would permit the Court itself to make an essentially legislative decision in the effort to reach the intent of Congress. If, however, such an inquiry were made, it would serve as much to reinforce as to contradict the conclusion that Congress intended by section 26 to grant exemption to the federal land banks from all forms of taxation, except only real estate.

The organization of the federal land banks under the Federal Farm Loan Act, 39 Stat. 360, has several times been described by this Court. *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 202–207; *Federal Land Bank* v. *Gaines*, 290 U. S. 247, 251–254; *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 232–233; *Knox Loan Assn.* v. *Phillips*, 300 U. S. 194, 198–200. It is sufficient here to note that the Act set up twelve federal land banks, under the control of the Federal Farm Loan Board, to make

mortgage loans to farmers at low interest rates. Sections 3, 4, 12. The loans are made through national farm loan associations, which are local cooperative organizations of borrowers. Section 7. Each borrower subscribes to the stock of the association in the amount of 5 percent of his loan; the association subscribes to the stock of the federal land bank to the extent of 5 percent of its outstanding debt to the bank. The stock subscriptions are retired as the loans are repaid. Sections 7, 8. The federal land banks may issue farm loan bonds to an amount twenty times their capital and surplus. Sections 13, 14. The Treasury subscribed almost all of the original capital stock; this, in turn, had almost completely been retired by 1937.[29] The subsequent distressed farm conditions, however, led to heavy Government contributions to the capital and surplus of the federal land banks (see *Federal Land Bank* v. *Priddy, supra,* 232–233); on December 31, 1940, the Government owned 37.9 percent of the capital stock outstand-

[29] $8,892,130 of the original $9,000,000 capitalization of the twelve banks was Treasury subscribed; by 1931 only $204,698 of the $65,676,130 capital stock was Government owned. *Federal Land Bank* v. *Priddy, supra,* 232–233. The Government on December 31, 1932, owned 66.1 percent of the capital stock of the federal land banks; this declined to about 52 percent by 1934, stayed at that figure until 1940, and declined again to 37.9 percent by December 31, 1940. Eighth Annual Report of the Farm Credit Administration (1940), p. 173.

ing and had contributed 61.6 percent of the total capital structure.[21]

The guiding purpose of the federal land bank system is the provision of needed credit facilities, at the lowest possible interest rates, to farm borrowers. See S. Rpt. No. 144, 64th Cong., 1st Sess. (1916), pp. 7, 9, 10; sec. 12 of Federal Farm Loan Act, 39 Stat. 360; *Federal Land Bank* v. *Gaines, supra*, 250, 254. While the Court in *Smith* v. *Kansas City Title Co., supra*, chose to rely upon the depositary and bond purchasing functions of the federal land banks to sustain their constitutionality, it may no longer be doubted that their lending functions constitute "the performance of an important governmental function." *Federal Land Bank* v. *Priddy, supra*, 231. See *United States* v. *Butler*, 297 U. S. 1, 65; *Helvering* v. *Davis*, 301 U. S. 619, 640–641.

Congress intended that the costs of administration be held to the minimum. The interest rate to borrowers, under section 12 of the Federal Farm Loan Act, 39 Stat. 360, cannot exceed by more than

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[21] The Government owned $67,402,295 of the $177,949,308 capital stock outstanding, and had contributed a balance of $145,225,633 to paid-in surplus. There was an earned surplus of $6,000,000 and undivided profits of $16,249,836. *Ibid.*, pp. 32–33, 173–177.

The Government at that time owned 71.8 percent of petitioner's $55,443,630 capital stock and had contributed a balance of $32,128,665 to its paid-in surplus. *Ibid.*, pp. 173–174.

one percent the interest rate upon the last issue of federal farm loan bonds, except with the approval of the Governor of the Farm Credit Administration, and in no event is to be more than 6 percent per annum. This is a small margin out of which to provide the costs of administration and reserves for losses on defaulted loans. The liability of the federal land banks to sales taxes upon their purchases would to some extent at least increase the costs of administration and would correspondingly contribute to the need that a higher interest rate be exacted from the borrower.

A strong argument might have been presented to Congress that the effect of state taxation was small in amount and remote in causation. However, Congress could equally have been swayed by a plea that interest rates be held to a minimum and that nothing be allowed to reduce the security of the federal farm loan system, which was based only upon the capital structure and the protection offered by the one percent margin. Congress indisputably sacrificed to the purposes of the federal land bank system a large volume of state revenues which could have been realized from taxation of federal land bank bonds, mortgages, capital, and income. It might well have felt that the operations of the federal land bank system would so expand the taxable wealth of the respective states that they could reasonably be expected to forego the revenue

to be derived from taxes imposed upon the banks themselves. In any event, we cannot believe, whatever might have been the view of enlightened economists in 1916, that Congress would have intended to permit operating expenses to be increased by sales taxes when, except for the traditional leave to tax real property, all other types of taxation were forbidden.

This conclusion is reinforced when it is considered that here, too, "this is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." *Clallam County* v. *United States*, 263 U. S. 341, 345. One ordinarily would hesitate before reading a federal tax exemption provision to exempt from state taxation an organization conducted for private profit. But, contrary to the statement of the court below (R. 36), such is not the case with the federal land banks. Over a third of its stock is owned by the United States, the remainder by its borrowers (*supra*, pp. 29–30). Of the stock owned by borrowers, almost all is owned by national farm loan associations.[24] These associations are federal instrumentalities. *Knox Loan*

[24] On December 31, 1940, the associations owned $106,960,080 of capital stock, while borrowers with direct loans (those not in a territory served by an association) owned $3,577,925 of the total capital stock of $177,940,300. Eighth Annual Report of Farm Credit Administration (1940), p. 173.

Assn. v. *Phillips*, 300 U. S. 194, 202. When dividends are declared by the federal land banks, which has not occurred since 1931,[23] they are paid to the loan association.[24] When these associations declare dividends, they go to the borrowers, who are its stockholders, and serve in effect to reduce the cost of borrowing. At no point, therefore, does the federal land bank system depart from its basic purpose to provide credit at the lowest possible rate, and to no person other than the borrower is the federal land bank stock ever a source of private profit.

6. *The administrative and judicial practice.*[25] It has been twenty-five years since section 26 of the Federal Farm Loan Act was enacted, and twenty-eight years since the standard tax exemption clause was first enacted in the Federal Reserve Act (section 7, 38 Stat. 251, 258). If there were any uniform practice with respect to the payment of sales taxes under these tax exemption clauses, it would quite evidently be a factor of considerable weight in their construction.

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[23] Sen. Doc. No. 172, 76th Cong., 3d Sess., p. 196.

[24] The stock held by the United States, under section 5, receives no dividends.

[25] The information summarized in this section was obtained by letters addressed to the general counsel of each of the agencies listed in footnote 12, *supra*, p. 21. Their responses are summarized in Appendix B, *infra*, pp. 68–80.

Most of the federal agencies operating under the tax exemption clause (see note 12, *supra*, p. 21) have viewed this clause as exempting its purchases from any sales tax, whether imposed upon the purchaser or upon the seller. A few of the agencies have viewed the clause as exempting their purchases from taxes imposed upon the purchaser but not from those taxes which are viewed as imposed upon the seller; these are the Federal Reserve Banks, the Reconstruction Finance Corporation and, in some localities, the agencies controlled by the Farm Credit Administration and the Federal Home Loan Bank Board. The federal administrative construction, accordingly, is entirely uniform and consistent that the tax exemption clause forbids imposition of a sales tax, like that of North Dakota, which is laid upon the purchaser.

The decisions of the state courts present no such uniform picture. Federal agencies have been held exempt from sales taxes, and comparable taxes, in several states. *Federal Land Bank of Columbia* v. *State Highway Department*, 172 S. C. 174 (1933); *Craig* v. *Federal Land Bank of New Orleans*, 189 Miss. 309 (1940); *Roberts* v. *Federal Land Bank of New Orleans*, 189 Miss. 898 (1940); *Federal Reserve Bank* v. *Register of Deeds*, 288 Mich. 120 (1939); *City of Clifton* v. *State Board of Tax Appeals*, 17 Atl. (2d) 476 (N. J. S. Ct., 1941). On the other hand, a similar decision in *M. G. West*

Co. v. *Johnson*, 20 Cal. App. (2d) 95 (1937) certiorari denied, 302 U. S. 638, was qualified, if not overruled, in *Western Lithograph Co.* v. *State Board of Equalization*, 11 Cal. (2d) 156 (1938) and the decisions of the North Dakota court are to the contrary. *Federal Land Bank* v. *De Rochford*, 69 N. D. 382 (1939), and the case now at bar. So, too, is a decision of a New York trial court. *Home Owners' Loan Corporation* v. *McGoldrick* (S. Ct., June 26, 1941; 10 U. S. L. W. 2063), appeal pending.

The decisions of the state taxing authorities present an even greater contrariety of result. Five federal agencies operating under the standard tax exemption clause report a substantially complete exemption from all sales taxes and a sixth reports that it has a similar exemption from all sales taxes imposed upon the purchaser, and that it claims no greater exemption (*infra*, pp. 68–69). Three groups of agencies, those under the Federal Reserve Board, the Farm Credit Administration, and the Federal Home Loan Bank Board, operate under a decentralized administration and report widely varying results among the different states. In 16 states a substantially complete exemption from sales and gasoline taxes has, when claimed, been granted to these agencies; in 10 states there is a substantially consistent requirement that these taxes be paid; in 16 states the

rulings are inconsistent; and in 6 states, none imposing a sales tax, no exemption from the gasoline tax has been claimed (*infra*, pp. 69–79).[28]

The divergent treatment, within the same state, of different agencies and the variation in exemption of the same agency between the various states, cannot be traced to any single factor. The aggregate volume of purchases, or the amount involved in any single item, may be too small to warrant claiming an exemption. The insistence of tax collectors and of the negotiators representing the federal agency will vary from instance to instance. Those of the federal agencies which operate under a decentralized administration, such as those under the Farm Credit Administration and the Federal Home Loan Bank Board, will obtain different results in different administrative regions.

In short, the construction of the standard tax exemption clause by the federal agency is uniform in viewing their purchases as exempt from state sales taxes which are laid upon the purchaser. This uniform construction, extending over a quarter of a century, would normally be a significant

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[28] Summarized with more particularity, these three groups of agencies report: *Sales taxes:* an exemption is allowed when claimed in 9 states, denied in 9 states, allowed or denied varying with particular agencies in 5 states, and is not claimed in 2 states. *Gasoline taxes:* an exemption is allowed in 15 states, denied in 17 states, allowed or denied varying with particular agencies in 9 states, and is not claimed in 9 states. (See *infra*, pp. 79–80).

factor in this Court's construction of section 26. But the wide variation in the construction of these clauses by the state authorities and by the state courts may weaken to some extent the force of that federal administrative construction.

II

Congress Has Power to Exempt Petitioner From State Taxes

The main ground for the decision of the Supreme Court of North Dakota was that, whatever the meaning of section 26 of the Federal Farm Loan Act, Congress was without constitutional power to exempt the lending functions of the federal land banks from state taxation (R. 24–37). The decision represents a sharp departure from the premises of *Federal Land Bank* v. *De Rochford*, 69 N. D. 382, 390–392 (1939), which viewed petitioner's claim for exemption from the gasoline tax simply as a question of congressional intent. The argument of the present opinion seems to run as follows: the lending functions of the federal land banks are not essential governmental functions (R. 29–31, 34, 35–36); they have therefore no constitutional immunity from state taxation (R. 26–27, 30–33, 35–36); and Congress is accordingly without power to provide such an immunity (R. 24–25, 27, 36–37). Both the premises and the conclusion are without support in principle and are at war with controlling decisions of this Court.

A. THE LENDING FUNCTIONS OF THE FEDERAL LAND BANKS ARE "GOVERNMENTAL"

It is unmistakably clear, both on principle and on authority, that the functions of the United States cannot be separated into "governmental" or "essential" and "proprietary" or "non-essential" activities.[1]

In some eight cases this Court has denied tax immunity to activities of states or their subdivisions wholly or in part because the activities were considered to be proprietary or not essential to the continued existence of the state government.[2] The philosophic adequacy of this doctrine, even as applied to state governments, has been questioned. See Mr. Justice Black, concurring in *Helvering* v.

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[1] The argument is developed in some detail in the Government's brief *amicus curiae* in *Graves* v. *New York ex rel. O'Keefe*, No. 478, October Term, 1938, pp. 18–26. The decision in that and subsequent cases eliminates the need for detailed exposition here.

[2] *South Carolina* v. *United States*, 199 U. S. 437, 451–456; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172; *Ohio* v. *Helvering*, 292 U. S. 360; *Helvering* v. *Powers*, 293 U. S. 214; *Brush* v. *Commissioner*, 300 U. S. 352; *Helvering* v. *Therrell*, 303 U. S. 218; *Helvering* v. *Gerhardt*, 304 U. S. 405; *Allen* v. *Regents*, 304 U. S. 439; cf. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401. Earlier intimations of the doctrine may be found: Clifford, J., dissenting in *United States* v. *Railroad Company*, 17 Wall. 322, 333–335; *Ambrosini* v. *United States*, 187 U. S. 1, 7–8; White, J., dissenting in *Snyder* v. *Bettman*, 190 U. S. 249, 255.

Gerhardt, 304 U. S. 405, 425–427. But, certainly, there can be no basis upon which to extend the doctrine to federal activities.

The Constitution delegates to the central government certain enumerated powers. Congress can exercise no power not granted. By definition, therefore, if the federal activity is constitutional, it lies within the delegated powers. And if the Constitution delegates a given power to the federal government it cannot be said that this power is not governmental, that it is proprietary, or that it is not essential to the operations of the United States.

The realities of governmental practice confirm the result compelled by constitutional theory. It is not sufficient to dismiss as "private" the federal lending functions simply because the activity looks similar to that of a private bank or mortgage company. The purpose of the federal land bank system, for example, is not to make a profit out of farm loans. It is to offer credit to a large and needy class of borrowers. As its functions succeed, the welfare of the farmers, the credit structure of the nation, and the fiscal operations of the government are promoted. The similarity to private activities is, therefore, both superficial and irrelevant.

The practical consequences of extending to the federal government the "proprietary activity" doctrine would be alarming if not catastrophic. One supposes that the doctrine would permit

state regulatory control as well as taxation of federal activities.[3] One need only point to the national banks, the Federal Reserve Banks, the diversified operations of the institutions under the control of the Farm Credit Administration, the United States Postal Savings System, and the credit institutions under the control of the Federal Home Loan Bank Board, to indicate the startling implications of the decision below (R. 29, 31, 36) that the banking or lending activities of the United States are to be characterized as proprietary or nonessential.[4] It may be assumed, contrary to the decision below, that Congress could expressly immunize these institutions from each specific form of state control and state taxation. But it needs no elaboration to show that such a course has never been thought necessary and that the practical difficulties in the way of fore-

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[3] The federal taxing power, although equally bulwarked by the supremacy clause, probably does not reach as far as the federal regulatory powers. See *Board of Trustees* v. *United States*, 289 U. S. 48; *United States* v. *California*, 297 U. S. 175. Probably, then, the state regulatory powers would be as extensive as their taxing powers.

[4] The brief for the United States, intervenor, in *Loomis* v. *First Federal Savings and Loan Association*, No. 277, October Term, 1938 (dismissed on motion for petitioners, *sub. nom. Martin* v. *First Federal Savings and Loan Ass'n*, 305 U. S. 666) lists and classifies (pp. 11-15) some 38 separate financial agencies of the United States, comprising about 15,000 separate corporations or organizations, with assets of about $44,000,000,000.

seeing all of the varying forms of State regulation or taxation would make the process intolerably unsatisfactory.[7]

This Court has always been careful to confine the doctrine of proprietary activities to state functions.[8] See *South Carolina* v. *United States*, 199 U. S. 437,

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[7] The practical justification offered for application of the "proprietary" doctrine to state activities is also absent. The states have all the residuary powers of government, and there are few, if any, fields of commercial or industrial activity forbidden to them or their political subdivisions by the federal Constitution. See *Jones* v. *City of Portland*, 245 U. S. 217; *Green* v. *Frazier*, 253 U. S. 233. The exercise of the state powers in this regard, whether to a limited degree or to their fullest extent, may well be essential to the welfare of the state and its citizens. But any wide exercise of the unlimited powers of the states to displace private enterprise would raise a serious question as to federal revenue sources if immunity were to follow every state activity. See, particularly, *South Carolina* v. *United States*, 199 U. S. 437, 454; *Helvering* v. *Gerhardt*, 304 U. S. 405, 416. It is true that the scope of federal activities under the delegated powers have considerably expanded in recent years. But the comparatively greater readiness of Congress to waive immunity, which this Court has noted (*infra*, pp. 47–48), shows the threat to the revenue of the states not to be formidable.

[8] *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, is the only possible exception. From that opinion can be drawn an implication that the Court viewed the question for decision as whether the Panama Railroad was exercising governmental or proprietary functions. But the opinion is at least equally capable of a construction that the discussion related to the constitutionality of the undertaking, or was designed to bring the case within the rule of *Clallam County* v. *United States*, 263 U. S. 341, 345.

451–452; *Helvering* v. *Therrell*, 303 U. S. 218, 223. Its decisions, from the beginning of intergovernmental tax immunity litigation, have recognized and emphasized that every federal activity under the delegated powers is governmental in nature. *McCulloch* v. *Maryland*, 4 Wheat. 316, 432; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158–159. And in a recent series of notable decisions, each dealing with a corporate lending agency of the United States, the Court has categorically held that so long as the federal functions be constitutional there can be no question but that they are "governmental," not "proprietary," and "essential" rather than "non-essential." *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32; *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81, 83. The language of the Court in the *O'Keefe* case is conclusive:

> As the government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation.

The decisions of other state courts, apart from that at bar, with a single exception have held that

the lending agencies of the United States are engaged in governmental functions and are unqualified federal instrumentalities.[7]

Accordingly, so long as the lending activities of the federal land banks be constitutional, they must be viewed as essential, governmental functions equally with all other activities of the federal government. The Supreme Court of North Dakota did not challenge the lending functions of the federal land banks as unconstitutional.[8] It was, there-

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[7] *M. G. West Co.* v. *Johnson*, 20 Cal. App. (2d) 95 (1937), certiorari denied, 302 U. S. 638; *Federal Land Bank of Columbia* v. *State Highway Department*, 172 S. C. 174 (1933); *Federal Reserve Bank* v. *Register of Deeds*, 288 Mich. 120 (1939); *Geery* v. *Minnesota Tax Commission*, 204 Minn. 107 (1938), petition for certiorari dismissed by petitioner, 307 U. S. 648, judgment vacated on authority of *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, in 204 Minn. 622 (1939); *Federal Land Bank of New Orleans* v. *Tatum*, 174 Miss. 264 (1935); *Craig* v. *Federal Land Bank of New Orleans*, 189 Miss. 309 (1940); *Roberts* v. *Federal Land Bank of New Orleans*, 189 Miss. 898 (1940); *City of Clifton* v. *State Board of Tax Appeals*, 17 Atl. (2d) 476 (N. J. S. Ct. 1941); *Federal Land Bank* v. *De Rochford*, 69 N. D. 382, 390-392 (1939).

The single exception is *Home Owners' Loan Corporation* v. *McGoldrick*, June 26, 1941, 10 U. S. L. W. 2063, (S. Ct. of N. Y., 2d Dept., Trial Term), appeal pending.

[8] The court below viewed the federal depositary and bond purchasing functions of the federal land banks as truly governmental (R. 29). But, because the decision in *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, had been placed solely upon the ground of these functions (R. 29, 35) and because of its *a priori* conviction of that lending was inherently a priv-

fore, wholly mistaken in its conclusion that petitioner's lending activities were proprietary or non-essential functions. The federal land banks are, instead, "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231.

B. CONGRESS HAS POWER TO DETERMINE THE TAX IMMUNITY OR LIABILITY OF FEDERAL INSTRUMENTALITIES

The decision of the court below (R. 24–25, 27, 36–37) that Congress has no constitutional power to prescribe tax immunity for the lending functions of federal land banks is squarely contradicted by several decisions of this Court and disregards the rudimentary principles both of constitutional theory and of tax immunity litigation.[8]

1. *This Court Has Settled the Question.* In two leading decisions this Court has sustained the power of Congress to prescribe tax immunity through the very section 26 of the Federal Farm

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vate enterprise (R. 31, 36–37), the court below viewed the lending activities of the federal land banks as a faintly dishonest (R. 33) appendage to the governmental duties of the banks (R. 29, 33, 34). But it expressly recognized the constitutionality of these functions (R. 30–31).

[8] Our argument is presented in detail in the Government's briefs in *Graves* v. *N. Y. ex rel. O'Keefe*, No. 478, October Term, 1938, pp. 26–36, and *Pittman* v. *Home Owners' Loan Corporation*, No. 10, October Term, 1939, pp. 17–36. In view of the decision in the latter case, 308 U. S. 21, it is unnecessary again to make an elaborate argument.

Loan Act, 39 Stat. 360, here in issue, and a third has recently applied the reasoning of those cases to reach the same result under a similar statute.

In *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, the validity of section 26 was sustained so far as it exempted federal farm loan bonds from state or local taxation. The Court held that, under *McCulloch* v. *Maryland*, 4 Wheat. 316, "the power to make the securities here involved tax exempt necessarily follows" from the constitutional power of Congress to create the federal land banks (255 U. S. at 211–212).

In *Federal Land Bank* v. *Crosland*, 261 U. S. 374, the Court held invalid an Alabama tax upon the recordation of federal land bank mortgages. While it is true that the State did not challenge the validity of section 26, the opinion of the Court (261 U. S. at 377, 378, 379) leaves no doubt that it viewed its constitutionality as beyond question.

In *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, the Court held that section 4 (c) of the Home Owners' Loan Act, 48 Stat. 128, exempted the recordation of H. O. L. C. mortgages from state taxation and that the provision is constitutional. The Court said (308 U. S. at 32–33):

> Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. * * * *McCulloch* v. *Maryland*, *supra*, p. 426. * * * In this instance,

> Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. * * * Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

These decisions are conclusive of the issue here. Each, it is to be noted, contradicts the major premise of the decision below, since each sustains a congressional provision of immunity for the lending functions of a federal credit agency.

The court below ignored the *Pittman* case and distinguished the *Smith* and *Crosland* cases on the ground that the purchase of building materials was a part of "an enterprise additional to rather than incidental or related to the ostensible governmental purposes for which" the federal land banks "were created" (R. 33). But the *Smith* and *Crosland* cases, equally with that at bar, created a tax immunity for the "additional" enterprise of lending money to needy borrowers. If the opinion below be read as suggesting (see R. 33) that immunity from a sales tax is less important even to the lending functions of petitioner than is the immunity of its bonds and mortgage recordation, the short answer is that this is a question for Congress and not for the courts. Since section 26, as we have shown, exempts petitioner from every tax imposed upon it, there is no room for speculation as to whether the immunity from one tax as opposed

to another is wise or is necessary. *Pittman* v. *Home Owners' Corp.*, *supra*, 33. So long as there is a reasonable relationship betwen the legislation and the end which it is designed to promote, the courts have no power to reexamine the congressional decision that the statute is necessary and proper. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Logan* v. *United States*, 144 U. S. 263, 283; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 473–474.

2. *The Constitutional Basis.* The issue is so completely settled by the decisions of this Court that we need hardly reexamine the constitutional doctrine which gives to Congress full power to determine the tax immunity or liability of the instrumentalities which it creates. However, to err on the side of caution, the argument will briefly be sketched.

A basic postulate of a federated system such as ours is that the national government is composed of representatives of the people within each of the states, while the people outside of the state are without representation in the local legislatures. This, as Madison explained in the Federal Convention, made it necessary in Article VI to provide that the acts of Congress should be the supreme law of the land, because of "the propensity of the States to pursue their particular interests in opposition to the general interest."[10]

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[10] *Farrand*, Records of the Federal Convention, II, 27; see also I, 164.

This Court has specifically recognized that in practice as well as in theory Congress may be expected to legislate in recognition of the states' need for tax revenues, while the converse is not necessarily true.[11] *McCulloch* v. *Maryland*, 4 Wheat. 316, 435–436; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412–413, 416–417; see *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 478.

The supremacy clause of Article VI is, in truth, the historic cornerstone of the doctrine of federal tax immunity. Even in the absence of a specific congressional declaration of immunity, it operates to forbid state taxation because the law under which the federal instrumentality operates is supreme over, and thus to be protected against, the state taxing statute. The Court in *McCulloch* v. *Maryland*, *supra*, 426, placed its decision squarely on the "great principle" that "the constitution and

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[11] We know of no instance in which a state has ever waived the tax immunity of itself or of its agency. On the other hand the Congress has many times waived an immunity which otherwise, under existing decisions, would have attached to federal instrumentalities. Compare *Howard* v. *Gipsy Oil Co.*, 247 U. S. 503, and *Large Oil Co.* v. *Howard*, 248 U. S. 549, with *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 522–523; *Gillespie* v. *Oklahoma*, 257 U. S. 501, with *British-American Co.* v. *Board*, 299 U. S. 159, 161, 166. More specifically to indicate the frequency with which Congress waives tax immunity, there are gathered in the Government's brief in *Pittman* v. *Home Owners' Loan Corporation*, No. 10, October Term, 1939, pp. 34–35, some thirty-two Acts by which the Congress, in the course of only three Congresses (the 73d to 75th), has waived the immunity of its instrumentalities in whole or in part.

the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them." See also 4 Wheat. at 427, 433. For the succeeding half-century, the law of intergovernmental tax immunity was fashioned by this Court only in terms of federal supremacy.[12]

In *The Collector* v. *Day*, 11 Wall. 113, these cases were rearranged into a pattern which was intended to protect state activities equally with those of the National Government.[13] But even after the decision in *The Collector* v. *Day* the Court did not wholly lose sight of the traditional basis of tax immunity, or consistently ignore the specific constitutional

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[12] *Osborn* v. *United States Bank*, 9 Wheat. 738, 868; *Weston* v. *City Council of Charleston*, 2 Pet. 449, 466–468; *Dobbins* v. *Erie County*, 16 Pet. 435, 447–450; *Bank of Commerce* v. *New York City*, 2 Black 620, 632–634; *Bank Tax Case*, 2 Wall. 200; *The Banks* v. *The Mayor*, 7 Wall. 16, 25; *Bank* v. *Supervisors*, 7 Wall. 26.

Story entertained no doubt but that Congress could tax state instrumentalities although the states could not tax federal instrumentalities. *Story*, Constitution, I, Sec. 1053.

[13] None would quarrel with the decision so far as it expresses the principle that the doctrine of tax immunity ensures "the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system" (*Helvering* v. *Powers*, 293 U. S. 214, 225). But this by no means is the equivalent of saying that a particular type of tax must necessarily and automatically be given the same treatment without consideration of whether it be imposed by the federal or by a state government. This distinction is developed in more detail in our brief (pp. 26–36) as *amicus curiae* in *Graves* v. *New York ex rel. O'Keefe*, No. 478, October Term, 1938.

basis for immunity found in Article VI in favor of a nebulous concept based only upon the implications latent in a federated system. Numerous cases have recognized that the doctrine of immunity is grounded at least in part on the supremacy clause.[14] And, in recent decisions, the Court has again explicitly recognized that one, if not the chief, basis for federal tax immunity is the supremacy clause of the Constitution. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 478.[15]

The decisions of this Court, even during the period when *The Collector* v. *Day* stood unchallenged, have indicated with a high degree of uniformity that the Court was prepared to follow the legislative decision whenever it could be ascertained. Thus, the Court has frequently recognized that

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[14] *Missouri* v. *Gehner*, 281 U. S. 313, 321; *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 221; *Long* v. *Rockwood*, 277 U. S. 142, 147; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 613; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 117; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 521; *South Carolina* v. *United States*, 199 U. S. 437, 451–452; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41.

[15] The Court in *Graves* v. *New York ex rel. O'Keefe*, *supra*, 478–479, it is true, said "Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined." This statement seems to have been dictated more by the fact that the issue was not presented in that case than by the requirements of constitutional theory or of the decided cases.

Congress has an undoubted power to waive the immunity from state taxation which would otherwise attach to federal instrumentalities and transactions.[16] Still other cases have expressly recognized the power of Congress to create a tax immunity for persons who dealt with the Government and have held the taxpayer liable because Congress had provided no immunity.[17] Most significantly, the Court in a number of cases has extended immunity from state taxation only, or in part, because Congress has so provided.[18]

In few of these decisions recognizing that immunity from state taxation is a matter of congressional intention was the taxpayer the Govern-

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[16] *Van Allen* v. *The Assessors*, 3 Wall. 573, 583, 585; *People* v. *Weaver*, 100 U. S. 539, 543; *Mercantile Bank* v. *New York*, 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668; *Mid-Northern Co.* v. *Montana*, 268 U. S. 45; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 525–526; *Baltimore Nat. Bank* v. *Tax Comm'n*, 297 U. S. 209; *British-American Co.* v. *Board*, 299 U. S. 159.

[17] *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23; *Trotter* v. *Tennessee*, 290 U. S. 354; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, 129; *Shaw* v. *Oil Corp'n*, 276 U. S. 575, 578–579; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323; *Goudy* v. *Meath*, 203 U. S. 146, 149–150; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 121, 125; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 589, 592.

[18] *Bank* v. *Supervisors*, 7 Wall. 26, 30–31; *Choate* v. *Trapp*, 224 U. S. 665; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 212–213; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Lawrence* v. *Shaw*, 300 U. S. 245; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32–33; see Justices Brandeis and Stone, concurring in *Miller* v. *Milwaukee*, 272 U. S. 713, 716.

ment itself. In almost every case the taxpayer was a private person who dealt with the United States, or was "a corporation having its own purposes as well as those of the United States and interested in profit on its own account" (*Clallam County* v. *United States*, 263 U. S. 341, 345). The power of Congress to create an immunity for these private taxpayers applies *a fortiori*, and in greatly intensified form, when the immunity is created for the federal land banks, which are not organized for private profit and are virtually a part of the Government itself (see *supra*, pp. 28–33).

The implication necessarily drawn from these decisions is that the tax immunity of the United States and its instrumentalities is, within broad limits, a question simply of congressional enactment. There are, it is true, constitutional limitations. But, as a matter of rudimentary constitutional theory, they leave to Congress a broad field. Only if the tax immunity has no reasonable relation to the protection of the federal function, can Congress be incompetent to provide exemption; and only if a waiver of tax immunity would in some fashion destroy the federated system, could Congress be incompetent to provide liability. Legislation of either type is so unlikely as to leave the question, in practical terms, always one of congressional intention alone.

Congress, as we have shown, has provided in section 26 that petitioner shall be exempt from

sales taxes which are imposed on it. That provision is constitutional and disposes of the issue before the Court.

CONCLUSION

The North Dakota sales tax is imposed on the buyer. Petitioner's purchases are exempt under section 26, which grants immunity from taxation to "every Federal land bank." That section is constitutional. It is respectfully submitted, therefore, that the decision of the court below should be reversed.

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APPENDIX A

Federal Farm Loan Act of July 17, 1916 (39 Stat. 360; 12 U. S. C. Sec. 931):

SEC. 26. That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located: but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

Nothing herein shall be construed to exempt the real property of Federal and

joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

North Dakota Laws of 1937, c. 249:[1]

§ 1. DEFINITIONS.] The following words, terms, and phrases, when used in this Act, have the meanings ascribed to them in this Section, except where the context clearly indicated a different meaning:

(a) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, the State of North Dakota and any of its sub-divisions, departments or institutions, any County, City, Village, Township, School District, Park District, Municipal Corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit, and the plural as well as the singular number.

(b) "Sale" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

(c) "Retail Sale" or "Sale at Retail" means the sale to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property and the sale of steam, gas, electricity, water, and communication service to retail consumers or users, and shall include the ordering, selecting or aiding a customer to select any goods, wares, or merchandise from any price list, or catalogue, which such customer might order, or be ordered for such customer to be shipped directly to such cus-

[1] Laws of 1939, c. 241, imposes a correlative use tax.

tomer. By the term "processing" as used in this Act is meant tangible personal property that is used in manufacturing, producing or processing and which becomes an ingredient or component part of other tangible personal property and which latter tangible personal property becomes subject to the retail sales tax. The sale of an item of tangible personal property for the purpose of incorporating it in or attaching it to other real or personal property otherwise exempt from the sales tax shall for the purposes of this Act be considered as a sale of tangible personal property for a purpose other than for processing.

(d) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

(e) "Retailer" includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or furnishing of steam, gas, electricity, water and communication service, and tickets or admissions to places of amusement and athletic events as provided in this Act, and shall include any person as herein defined who by contract or otherwise agrees to furnish for a consideration a totally or partially finished product consisting in whole or in part of tangible personal property subject to the sales tax herein provided, and all items of tangible personal property entering into the performance of such contract as a component part of the product agreed to be furnished under said contract shall be subject to the sales tax herein provided, and the sales tax thereon shall be collected by the contractor from the person for whom the contract has been performed in addition to the contract

price agreed upon, and shall be remitted to the State in the manner provided in this Act.

(f) "Gross receipts" means the total amount of the sales of retailers, valued in money, whether received in money or otherwise, provided, however, that discounts for any purposes allowed and taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. Provided, further, that on all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty (60) days from the date of sale thereof that only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed by this bill, as has actually been received in cash by the retailer during each quarterly period as defined herein

(g) "Relief agency" means the State, any County, City and County, City or District thereof, or any agency engaged in actual relief work.

(h) "Commissioner" means the Tax Commissioner of the State of North Dakota.

(i) "Local Governmental Unit" means Incorporated Cities, Towns and Villages, Counties, School Districts and Townships.

§ 2. TAX IMPOSED.] There is hereby imposed, beginning the first day of May, 1937, and ending June 30th, 1939,[2] a tax of two

[2] Laws of 1939, c. 234, Sec. 1, amends Section 2 of the 1937 Act to extend the tax through June 30, 1941, and S. B. No. 40, approved March 14, 1941, amends the section to extend the tax through June 30, 1943.

percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of steam, gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing steam, gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this Act, when sold at retail in the State of North Dakota to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this Act.

The tax herein levied shall be computed and collected as hereinafter provided.

§ 3. EXEMPTIONS.] There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

(b) The gross receipts from the sales, furnishing or service of transportation service.

(c) The gross receipts from sales of tangible personal property used for the performance of a contract on public works executed prior to May 1st, 1935.

(d) The gross receipts from sales of tickets or admissions to State, County, district, and local fairs, and the gross receipts from

educational, religious, or charitable activities, where the entire amount of such receipts is expended for educational, religious, or charitable purposes.

(e) The gross receipts from the sale by any school board of this State of books and school supplies to regularly enrolled students at cost.

§ 4. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off, for income tax purposes may be credited upon subsequent payment of the tax herein provided; provided, that if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected. The provisions of this Act shall not apply to sales of gasoline, cigarettes, snuff, insurance premiums, or any other product or article upon which the State of North Dakota now or may hereafter impose a special tax, either in the form of a license tax, stamp tax or otherwise.

§ 5. CREDIT TO RELIEF AGENCY AND LOCAL GOVERNMENTAL UNITS.]

(1) A relief agency may apply to the Commissioner for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares, or merchandise used for free distribution to the poor and needy;

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§ 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

Agreements between competing retailers, or the adoption of appropriate rules and regulations by organizations or associations of retailers to provide uniform methods for adding such tax or the average equivalent thereof, and which do not involve price fixing agreements otherwise unlawful, and which shall first have the approval of the Commissioner, are expressly authorized and shall be held not to be in violation of any anti-trust laws of this State.

§ 7. UNLAWFUL ACTS.] It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

§ 8. RECORDS REQUIRED.] It shall be the duty of every retailer required to make a report and pay any tax under this division, to preserve such records of the gross proceeds of sales as the Commissioner may require and it shall be the duty of every retailer to preserve for a period of two years all invoices and other records of goods, wares, or merchandise purchased for resale; and all such books, invoices and other records shall be open to examination at any time by the Commissioner or any one of his duly authorized agents.

§ 9. RETURN OF GROSS RECEIPTS.]

(1) The retailer shall, on or before the 20th day of the month following the close of the first quarterly period as defined in the following Section, and on or before the 20th day of the month following each subsequent quarterly period of three months, make out

a return for the preceding quarterly period in such form and manner as may be prescribed by the Commissioner, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the Commissioner may require to enable him correctly to compute and collect the tax herein levied; provided, however, that the Commissioner may, upon request by any retailer and a proper showing of the necessity therefor, grant unto such retailer an extension of time of not to exceed thirty (30) days for making such return. If such extension is granted to any such retailer, the time in which he is required to make payment as provided for in Section Ten (10) of this Act shall be extended for the same period.

(2) The Commissioner, if he deems it necessary or advisable in order to insure the payment of the tax imposed by this Act, may require returns and payment of the tax to be made for other than quarterly periods, the provisions of Section Ten (10) or elsewhere to the contrary notwithstanding.

(3) Returns shall be signed by the retailer or his duly authorized agent, and must be verified by oath.

§ 10. PAYMENT OF TAX. BOND. CREATION OF LIEN.]

(1) The tax levied hereunder shall be due and payable in quarterly instalments on or before the 20th day of the month next succeeding each quarterly period, the first of such period being the period commencing with May 1, 1937, and ending on the 30th day of June, 1937.

(2) Every retailer, at the time of making the return required hereunder, shall compute

and pay to the Commissioner the tax due for the preceding period.

(3) The Commissioner may, when in his judgment it is necessary and advisable to do so in order to secure the collection of the tax levied under this Act, require any person subject to such tax to file with him a bond, issued by a surety company authorized to transact business in this State and approved by the Insurance Commissioner as to solvency and responsibility, in such amount as the Commissioner may fix, to secure the payment of any tax and or penalties due or which may become due from such person. In lieu of such bond, securities approved by the Commissioner, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the Commissioner and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and or penalties due. Upon any such sale, the surplus, if any above the amounts due under this division shall be returned to the person who deposited the securities.

Sub-section 4. LIEN OF TAX. COLLECTION ACTION AUTHORIZED.] Whenever any taxpayer liable to pay a tax and or penalty imposed refuses or neglects to pay the same, the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the State of North Dakota upon all property and rights to property, whether real or personal, belonging to said taxpayer.

The lien aforesaid shall attach at the time the tax becomes due and payable and shall continue until the liability for such amount is satisfied.

In order to preserve the aforesaid lien against subsequent mortgagees, purchasers or judgment creditors, for value and without notice of the lien, on any property situated in a County, the Tax Commissioner shall file with the Register of Deeds of the County in which said property is located, a notice of said lien.

* * * * *

§ 11. PERMITS; APPLICATIONS FOR.]

(1) It shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a retailer within this State shall file with the Commissioner an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the Commissioner and shall set forth the name under which the applicant transacts or intents to transact business, the location of his place or places of business, and such other information as the Commissioner may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall

be attached the written evidence of his authority.

(2) At the time of making such application, the applicant shall pay to the Commissioner a permit fee of fifty cents (50¢) for each permit, and the applicant must have a permit for each place of business.

(3) Upon the payment of the permit fee or fees herein required, the Commissioner shall grant and issue to each applicant a permit for each place of business within the State. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued.

* * * * *

§ 12. FAILURE TO FILE RETURN; INCORRECT RETURN.] If a return required by this division is not filed, or if a return when filed is incorrect or insufficient and the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the Commissioner, such Commissioner shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and or other factors. The Commissioner shall give notice of such determination to the person liable for the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply

to the Commissioner for a hearing or unless the Commissioner of his own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the Commissioner shall give notice of his decision to the person liable for the tax.

§ 13. APPEALS.]

(1) An appeal may be taken by the taxpayer to the District Court of the County in which he resides, or in which his principal place of business is located, within sixty days after he shall have received notice from the Commissioner of his determination as provided for in the preceding Section.

* * * * * *

§ 15. PENALTIES; OFFENSES.]

(1) Any person failing to file a return or corrected return or to pay any tax within the time required by this division, shall be subject to a penalty of five per cent (5%) of the amount of tax due, plus one per cent (1%) of such tax for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax became due; but the Commissioner, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the Commissioner and disposed of in the same manner as other receipts under this Act. Unpaid penalties may be enforced in the same manner as the tax imposed by this Act.

(2) Any person who shall sell tangible personal property, tickets or admissions to places of amusement and athletic events, or steam, gas, water, electricity and communi-

cation service at retail in this State after his license shall have been revoked, or without procuring a license within sixty (60) days after the effective date of this Act, as provided in Section 11 of this Act, or who shall violate the provisions of Section 7 of this Act, and the officers of any corporation who shall so act, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than $1,000.00 or imprisonment for not more than one year, or both such fine and imprisonment, in the discretion of the Court.

(3) Any person required to make, render, sign, or verify any return or supplementary return, who makes any false or fraudulent return with intent to defeat or evade the assessment required by law to be made, shall be guilty of a misdemeanor and shall, for each such offense, be fined not to exceed Five Hundred Dollars or be imprisoned in the County jail not exceeding one year, or be subject to both a fine and imprisonment, in the discretion of the Court.

(4) The certificate of the Commissioner to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this Act, shall be prima facie evidence thereof.

(5) Any person failing to comply with any of the provisions of this Act, or failing to remit within the time herein provided to the State the tax due on any sale or purchase of tangible personal property subject to said sales tax, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the County jail not exceed-

ing six months or by a fine not exceeding Five Hundred Dollars, or by both such fine or imprisonment at the discretion of the Court. This criminal liability shall be cumulative and in addition to the civil liability for penalties hereinbefore provided.

* * * * *

§ 21. CORRECTION OF ERRORS.] If it shall appear that, as a result of mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this Act, then such amount shall be credited against any tax due, or to become due, under this Act from the person who made the erroneous payment, or such amount shall be refunded to such person by the Commissioner.

* * * * *

§ 23. If any section, sub-section, clause, sentence, or phrase of this Act is for any reason held to be unconstitutional and invalid, such decision shall not effect the validity of the remaining portions of this Act. The Legislature hereby declares that it would have passed this Act and each section, sub-section, clause, sentence or phrase hereof, irrespective of whether any one or more of the sections, sub-sections, clauses, sentences, or phrases, be declared unconstitutional.

APPENDIX B

Administrative and Judicial Experience Under the Tax Exemption Clause

The information collected in this Appendix was gathered from correspondence with the general counsel of the respective agencies operating under a tax exemption clause (see note 12, *supra*, p. 21). The Farmers Home Corporation has had no operating functions, since the Secretary of Agriculture, for administrative reasons, has chosen under section 40 (b) of the Act (50 Stat. 522) to exercise these functions himself. The experience of the other corporations may be summarized as follows:

I

Agencies Operating Under a Substantially Uniform Exemption

A. *The Agencies*

The following agencies report that no sales taxes are imposed or paid on their purchases:

Reconstruction Finance Corporation.
Federal Deposit Insurance Corporation.
Federal Savings and Loan Insurance Corporation.
United States Housing Authority.
Federal Crop Insurance Corporation.

B. *Exceptions to Administrative Practice*

Reconstruction Finance Corporation pays sales taxes which are imposed by law on the seller rather than the purchaser. No other agency in this group makes this distinction.

Federal Deposit Insurance Corporation reports that "in a few instances to avoid delay we pay the tax as a part of the purchase price."

United States Housing Authority notes that in some instances bidders may include the sales tax in their price without the knowledge of the Authority.

Federal Crop Insurance Corporation, which purchases either through the machinery of the Department of Agriculture or on the grain exchanges, reports no exception.

Federal Savings and Loan Insurance Corporation also reports no exception.

II

AGENCIES WITH VARIABLE EXPERIENCE WITH RESPECT TO EXEMPTION

A. *The Agencies*

The following agencies report a variable experience with respect to sales taxes on their purchases.

Farm Credit Administration:
- Federal Land Banks.
- National Farm Loan Associations.
- Federal Intermediate Credit Banks.
- Central Bank for Cooperatives.
- Banks for Cooperatives.
- Production Credit Corporation.
- Production Credit Associations.
- Federal Farm Mortgage Corporation.

Federal Home Loan Bank Board:
Federal Home Loan Banks.
Home Owners' Loan Corporation.
Federal Reserve Banks.

With occasional exceptions, the Federal Reserve Banks pay an amount representing sales taxes on their purchases when the tax is considered to be a tax on the seller and have successfully resisted those taxes when it is considered to be a tax on the purchaser. The Home Owners' Loan Corporation has, in general, announced the same policy to its regional offices. A few of the district offices of the Farm Credit Administration have adopted the same criterion.

The detailed experience of these agencies with state officials cannot, however, be reconciled according as the tax is laid on the purchaser or on the seller. That experience is most readily summarized by states.[1]

B. *States Granting Exemption*

In 16 states a substantially complete tax exemption has, when claimed, been granted to these agencies:

Arkansas.—The agencies under the Farm Credit Administration report that they are exempt upon both the state sales and gasoline taxes. The Federal Reserve Bank, however, pays gasoline taxes.

Colorado.—The agencies under the Farm Credit Administration, as a result of negotiations with the state taxing authorities, have not paid the sales tax.

[1] The summary doubtless contains inaccuracies as to specific agencies in specific states. But, since the over-all picture would be no different, an arduous refinement and check was not undertaken.

However, the gasoline tax has been paid, as a matter of policy.

Florida.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled exempt from the state taxes upon gasoline.

Idaho.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax and from motor vehicle license fees; the gasoline tax, which aggregates only a small amount, has been paid pending the development of a practicable procedure to obtain refunds upon the exempt purchases.

Iowa.—The agencies under the Farm Credit Administration have been exempted, under the rulings of state officials, from the sales, the use and the gasoline tax.

Kansas.—The agencies under the Farm Credit Administration have been ruled, after negotiations, to be exempt from the sales tax; however, they pay the gasoline tax as a matter of policy. The Home Owners' Loan Corporation, and apparently the Federal Reserve Bank, have been ruled to be exempt from the sales tax.

Louisiana.—The agencies under the Farm Credit Administration have been ruled to be exempt from the state sales tax and gasoline tax, and to be exempt from the sales tax imposed by the city of New Orleans. The issue was reopened after the decision of the North Dakota court in the present *Bismarck Lumber* case, but the state authorities decided to adhere to their earlier position.

Massachusetts.—There is no sales tax. The agencies under the Farm Credit Administration do not claim an exemption from the gasoline tax, but nevertheless have been exempted on their purchases from the Standard Oil Company of New York.

The Federal Reserve Bank does not claim an exemption because the amount is too small.

New Hampshire.—There is no sales tax. The agencies under the Farm Credit Administration, as a matter of policy, do not claim exemption from the gasoline tax, but an exemption is nevertheless allowed in the case of purchases from the Standard Oil Company of New York.

North Carolina.—The agencies under the Farm Credit Administration have been ruled to be exempt from the state sales and gasoline taxes. However, under a ruling of its local counsel, the Federal Home Loan Bank pays the state sales tax. The Federal Reserve Bank has been ruled exempt from the sales tax.

Ohio.—The agencies under the Farm Credit Administration do not claim an exemption from the sales tax, but have been ruled exempt from the gasoline tax. The Home Owners' Loan Corporation, in the last of a series of rulings of the state tax commission, was held exempt from the sales tax.

South Carolina.—There is no sales tax, but the agencies under the Farm Credit Administration have been held to be exempt from the gasoline tax. They were ruled exempt from automobile license fees in *Federal Land Bank of Columbia* v. *State Highway Department*, 172 S. C. 174 (1933).

Virginia.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax.

Washington.—The agencies under the Farm Credit Administration have been ruled to be exempt from the state sales tax, gasoline tax, and automobile license fees. The Federal Reserve Bank is exempt from the sales tax.

West Virginia.—The agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax, but, since the purchases are few, they have claimed no exemption from the sales tax.

Wisconsin.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax.

C. *States Refusing Exemption*

In 10 states there is a fairly consistent requirement that sales and gasoline taxes be paid.

Alabama.—The state authorities have ruled that the agencies under the Farm Credit Administration are liable both for sales and for gasoline taxes. The rulings are recent and litigation is contemplated.

Delaware.—There is no sales tax, but the agencies under the Farm Credit Administration are required to pay the gasoline tax.

Minnesota.—There is no sales tax, but the agencies under the Farm Credit Administration are required to pay the gasoline tax. The Federal Reserve Bank pays the gasoline tax without contest because of its small amount.

Montana.—There is no sales tax, but the agencies under the Farm Credit Administration are required to pay the gasoline tax. Litigation is contemplated but is not being pressed. The Federal Reserve Bank pays the gasoline tax without contest because of its small amount.

Nebraska.—There is no sales tax, but the agencies under the Farm Credit Administration have paid the gasoline tax after unsuccessful negotiation.

Nevada.—There is no sales tax, but the agencies under the Farm Credit Administration pay the gasoline tax.

New Mexico.—The agencies under the Farm Credit Administration were exempt from the state sales tax under the earlier rulings of state authorities; these rulings were reversed early in 1941 and the agencies have since been paying the sales tax. They also pay the gasoline tax.

North Dakota.—The agencies under the Farm Credit Administration have been paying the state gasoline tax since the decision in *Federal Land Bank* v. *De Rochford*, 69 N. D. 382 (1939). The present case arises from the insistence of the state authorities that these agencies pay the sales tax.

Oregon.—There is no sales tax, but the agencies under the Farm Credit Administration pay the gasoline tax.

Wyoming.—Agencies under the Farm Credit Administration have had no experience under the sales tax, but they have paid the gasoline tax.

D. *States Where No Exemption Has Been Claimed*

In 6 states, none of which has a sales tax, the agencies under the Farm Credit Administration have paid the gasoline tax, without claiming an exemption, since they view it as an appropriate fee for the use of the state highways. These states are:

Connecticut
Maine
New Jersey
Pennsylvania
Rhode Island
Vermont

E. *States Without a Consistent Position*

In 16 states the rulings with respect to the standard tax exemption clause of federal instrumentalities are not consistent. Variations may be explained in terms of differences in the types of tax, in the failure of the agencies to claim exemption, and in the vigor with which they have prosecuted their negotiations.

Arizona.—The agencies under the Farm Credit Administration are paying sales and gasoline taxes for reasons of policy. On the other hand, the Home Owners' Loan Corporation objected successfully to payment of tax upon the sale of water.

California.—At least subsequent to the decision in *M. G. West Co.* v. *Johnson,* 20 Cal. App. (2d) 95 (1937), certiorari denied, 302 U. S. 638, the agencies under the Farm Credit Administration did not pay the state sales tax. Subsequently, after the *West* case was qualified or overruled in *Western Lithograph Co.* v. *State Board of Equalization,* 11 Cal. (2d) 156 (1938), the state officials held that these agencies were taxable. They have, as a matter of policy, not contested those rulings. These agencies also pay the gasoline tax, except that under state rulings the Production Credit Corporation and the Intermediate Credit Bank are exempt. The Home Owners' Loan Corporation successfully resisted payment of the state sales taxes. Until 1939 the Federal Home Loan Bank did not pay sales taxes; thereafter they have acquiesced in a state ruling holding them liable. The Federal Reserve Bank pays the sales tax.

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Georgia.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax. However, they report that they are paying this tax pending completion of negotiations and litigation as to the form of exemption certificates to be used. The Federal Reserve Bank pays gasoline taxes.

Illinois.—The agencies under the Farm Credit Administration have been ruled by the state authorities to be exempt from the gasoline tax. However, they have been ruled subject to the sales tax; since relatively few purchases are made in Illinois, this ruling has not been contested. The Home Owners' Loan Corporation was exempted from the state sales tax in 1937 but has paid sales taxes since 1939. The Federal Reserve Bank pays both the sales and gasoline tax.

Indiana.—The agencies under the Farm Credit Administration have paid sales taxes without claiming exemption, but, after negotiations with the state authorities, obtained an exemption from the gasoline tax. The Federal Reserve Bank pays the gasoline tax.

Kentucky.—The agencies under the Farm Credit Administration do not pay the automobile sales tax and, after negotiations with the state authorities, obtained an exemption from the gasoline tax. The Federal Reserve Bank, however, pays the gasoline tax.

Maryland.—There is no sales tax. The agencies under the Farm Credit Administration are exempt from the tax upon the transfer of automobiles, but the Federal Land Bank has paid this tax because in its case the exemption was conditioned upon

using a special tag. The agencies under the Farm Credit Administration pay the gasoline tax. The Federal Reserve Bank also pays the tax, stating that it does not claim the available refund because the amount is too small.

Michigan.—The agencies under the Farm Credit Administration pay the sales tax and the gasoline tax. The Home Owners' Loan Corporation, on the other hand, has been exempted from the sales tax. The Federal Reserve Bank was held exempt from a mortgage recording tax in *Federal Reserve Bank* v. *Register of Deeds,* 288 Mich. 120 (1939).

Mississippi.—The agencies under the Farm Credit Administration were first ruled exempt from the state sales tax and then ruled to be taxable by the state authorities; litigation is contemplated. These agencies were exempted from the gasoline tax by the decision in *Craig* v. *Federal Land Bank of New Orleans,* 189 Miss. 309 (1940). But, in consequence of the repeal of the exemption of the United States and its instrumentalities, the state authorities have since ruled that they are subject to the gasoline tax. The Federal Reserve Bank pays the gasoline tax. In *Roberts* v. *Federal Land Bank of New Orleans,* 189 Miss. 898 (1940), the court ruled that section 26 of the Federal Farm Loan Act exempted the Federal Land Bank from the privilege tax upon automobiles.

Missouri.—The agencies under the Farm Credit Administration and the Federal Reserve Bank have been ruled by the state authorities to be exempt from the sales tax but subject to the gasoline tax.

New York.—The agencies under the Farm Credit Administration, because they are only

slightly affected, have not claimed exemption from the New York City sales tax. They do not claim an exemption from the gasoline tax, but an exemption is nevertheless allowed in the case of purchases from the Standard Oil Company of New York. The Federal Reserve Bank has been ruled exempt from the city sales tax. Reversing an earlier ruling, the city authorities held that the Home Owners' Loan Corporation was subject to the New York City sales tax. The corporation brought suit to recover taxes paid under protest. The trial court, largely upon the authority of the present *Bismarck Lumber* case as it was decided by the Supreme Court of North Dakota, has ruled that the corporation is liable for the sales tax; the case is now pending on appeal. *Home Owners' Loan Corporation* v. *McGoldrick*, 10 U. S. L. W. 2063.

Oklahoma.—The agencies under the Farm Credit Administration, pending a ruling of the Oklahoma tax commission, are paying the sales tax; they also pay the gasoline tax. The Home Owners' Loan Corporation has successfully resisted payment of the sales tax.

South Dakota.—The agencies under the Farm Credit Administration have been held exempt from the automobile sales tax, but they pay the gasoline tax.

Tennessee.—The agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax. The Federal Reserve Bank pays the gasoline tax.

Texas.—There is no sales tax, but the agencies under the Farm Credit Administration have been

ruled to be exempt from the gasoline tax and from the automobile license fees. The Federal Reserve Bank, however, was denied exemption from the gasoline tax.

Utah.—The agencies under the Farm Credit Administration pay both the sales and gasoline tax. The Federal Reserve Bank, however, does not pay the sales tax.

F. *Summary By States As To Agencies With Variable Experience*

1. *Sales Tax.*

Exemption when claimed is granted in 9 states: Arkansas, Colorado, Iowa, Kansas, Louisiana, North Carolina, Ohio, South Dakota, Washington.

Exemption is denied in 9 states: Alabama, Illinois, Indiana, Kentucky, Mississippi, Missouri, New Mexico, North Dakota, Tennessee.

Exemption is granted some of these agencies and denied to others in 5 states: Colorado, Michigan, New York (city sales tax), Oklahoma, Utah.

Exemption is not claimed in 2 states: Arizona, West Virginia.

2. *Gasoline Tax.*

Exemption is granted in 15 states: Florida, Idaho, Iowa, Louisiana, Massachusetts, New Hampshire, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, Washington, West Virginia, Wisconsin.

Exemption is denied in 17 states: Alabama, Delaware, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Wyoming.

Exemption is granted to some of these agencies and denied to others in 7 states: Arkansas, Colorado, Georgia, Illinois, Indiana, Kentucky, Texas.

Exemption is not claimed in 9 states: Arizona, Colorado, Connecticut, Kansas, Maine, New Jersey, Pennsylvania, Rhode Island, Vermont.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

THE FEDERAL LAND BANK OF SAINT PAUL,
Petitioner,

v.

BISMARCK LUMBER COMPANY, AND JOHN GRAY, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

JURISDICTION

The jurisdiction is conceded and rests on Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT

This is an action brought by the plaintiff, the *Federal Land Bank of Saint Paul, petitioner, vs. Bismarck Lumber Company, and John Gray, as Tax Commissioner of the State of North Dakota*, and is based upon the following facts:

The State Sales Tax Act of the State of North Dakota (Chapter 249, Laws of 1937) in force during the time involved in this controversy provided:

> "Sec. 2. There is hereby imposed * * * a tax of two percent (2%) upon the gross receipts from all sales

of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users * * *."

"Sec. 3. There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following: (a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State * * *."

"Sec. 4. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off, for income tax purposes may be credited upon subsequent payment of the tax herein provided; provided, that if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected * * *."

* * * * * * * * * *

"Sec. 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts * * *."

"Sec. 7. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded."

The defendant, Bismarck Lumber Company, is engaged in the business of selling lumber and other building materials as a retailer in the city of Bismarck, North Dakota. The plaintiff, Federal Land Bank of Saint Paul, had acquired certain real property in the State through mortgage foreclosure proceedings. The plaintiff purchased from the defendant Lumber Company certain lumber and other building

material to be used in repairing, improving and maintaining the buildings on the farm lands which it had acquired and owned.

The price of the materials thus purchased was $401.00. To this sum the defendant added $8.02, the amount of the two per cent (2%) sales tax. The plaintiff paid the sales price of $401.00, but refused to pay the sales tax of $8.02, basing its refusal on the claim that under the provisions of Section 26 of the Federal Farm Loan Act and the Constitution of the United States it was exempted from payment of the North Dakota sales tax.

The defendant, Lumber Company, however, contended that the building material so sold by it to the plaintiff was subject to the sales tax, and that, therefore, it was the legal duty of the defendant to add the amount of the sales tax to the purchase price.

The plaintiff, Federal Land Bank, brought action in the District Court of Burleigh County against the Lumber Company and the Tax Commissioner of the State for the purpose of procuring a determination of the issues thus raised, and "for a declaratory judgment adjudicating and determining the rights, liabilities, status and legal relations of the parties, and for a determination whether the sales in question were subject to the sales tax, and whether the Lumber Company might legally add the amount of the sales tax to the sales price and whether the plaintiff, Land Bank, was under obligation to pay the same."

The District Court found for the defendant, and held that the sales by the Lumber Company to the plaintiff were subject to the state sales tax; that the Lumber Company was required to collect and pay over to the State the sales tax on such sales, and therefore, add the amount thereof to the sales price.

Judgment was accordingly entered by the District Court.

On appeal to the State Supreme Court, the judgment of the District Court was affirmed, and the matter is now before this Court on a Writ of Certiorari to the Supreme Court of the State of North Dakota.

POINTS CONCEDED

1. That the Act of Congress creating the Federal Land Bank is valid and that the other Land Banks are instrumentalities of the government, so far as they are engaged in discharging governmental functions.

2. That under the provisions of Chapter 249 of the Session Laws of North Dakota for 1937, and amendments thereto, known as the Sales Tax Act, the tax is imposed upon the buyer and not upon the seller; the seller acting simply as a collecting agent for the State.

Jewel Tea Company vs. State Tax Commission, 70 N. D. 229, 293 N. W. 386.

ISSUES

The issues before this Court are:

Whether in the transaction of purchasing lumber and other building materials from the defendant, Bismarck Lumber Company, within the State of North Dakota, the plaintiff, the Federal Land Bank, is exercising a necessary governmental function, and whether the imposition of the North Dakota sales tax upon such transactions is prohibited by Section 26 of the Federal Farm Loan Act.

12 U. S. C. A., par. 931.

Section 26 of the Federal Farm Loan Act of July 17, 1916 (39 Stat. 360, 12 U. S. C., Sec. 931).

"Sec. 26. That every Federal land bank and every national farm loan association, including the capital

and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State and municipal and local taxation.

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

ARGUMENT

It is the contention of the defendants that the purchase of building materials to be used in repairing buildings on its farms is not a necessary governmental function, nor incidental thereto.

The plaintiff, Federal Land Bank, acquired its lands through foreclosure of mortgages executed by the owners of the land. The foreclosure proceedings were had and title perfected in the plaintiff under the provisions of the laws of the State of North Dakota. The plaintiff acquired its title in the same manner as scores of other property owners in the State, and enjoys the same protection of its property

and property rights as other corporations and private citizens.

The building materials purchased by the plaintiff were used in repairing, preserving and maintaining the buildings upon the lands it had acquired and from the nature of the case, such buildings are fixtures and part of the realty. The plaintiff claims exemption from the sales tax of the State of North Dakota under the provisions of Section 26 of the Federal Farm Loan Act of July 17, 1916 (39 Stat. 360, 12 U. S. C., Section 931).

In their brief counsel for plaintiff wholly ignore the proposition as to whether the purchase of building materials by the plaintiff is an exercise of a necessary governmental function. In other words, they assume that it is, and then dismiss it without further argument or citation of authority.

Counsel for plaintiff, however, cite numerous cases in support of the general proposition that every Federal Land Bank is exempt from State taxation, except taxes upon real estate held by said banks. Among the cases cited are the following:

M'Culloch vs. Maryland, 4 Wheat. 316.

Osborn, et al., vs. The Bank of United States, 9 Wheat. 738.

United States vs. Railroad Company, 17 Wall. 322.

Van Brocklin vs. State of Tennessee, 117 U. S. 151.

Clallam County vs. United States, 263 U. S. 341.

New Brunswick vs. United States, 276 U. S. 547.

We shall attempt briefly to analyze these cases in order to ascertain their application to the issues in the instant case.

In the case of *M'Culloch vs. Maryland, supra*, it was held that Congress had the constitutional power to incorporate a bank and further "the power of establishing a corporation

is not a distinct sovereign power of any government, but only a means of carrying into effect *other powers which are sovereign*. Whenever it becomes an appropriate need of exercising any other powers given by the Constitution to the government of the Union, it may be exercised by that government."

Further, with reference to the principles laid down, the Court said:

> "That these states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

The opinion of the Court continues:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

In the case of *Osborn vs. United States*, 9 Wheat. 738, the doctrine laid down in *M'Culloch vs. Maryland* was re-examined. The Court said:

> "We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those

operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially."

In the case of *Van Brocklin vs. Tennessee*, *supra*, the substance of the decision is to the effect that land situated in the State which is acquired by the United States through sale or through taxes levied pursuant to the sale are not subject to State taxation while still owned by the United States.

In the case of *Clallam County vs. United States*, it was held that a State cannot tax the property of a corporation organized by the federal government to produce material for war purposes, the property of which is conveyed to the government, or bought with money of the United States and used solely for the purpose of its creation. The function exercised by that corporation was exercised for purely governmental purposes, and in fact, could be exercised only by the federal government itself, or by the governmental agency created by the government for that purpose. It seems clear that only by far-fetched and extreme logic could it be held that purchase by the Federal Land Bank of building material to be used on taxable farms, is a governmental function.

In the case of *New Brunswick vs. United States*, it was held that upon sale by a corporation belonging to the federal government under an Act of Congress of property acquired by it for governmental purposes, which could not be sold without reserving a first lien for unpaid purchase

money, when sufficient payments are made to entitle the purchaser to a deed, local taxes may be assessed against the entire property and make the lien enforceable against the interest of the purchaser, but not against that of the government.

In the case of *Smith vs. Kansas City Title and Trust*, 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 577, it was held that Federal Land Banks and joint stock land banks having been created by Congress in the exercise of its legitimate authority by the Federal Farm Loan Act of July 17, 1916, as amended by the Act of January 18, 1918, the power to make farm loan bonds issued by them upon securities of farm mortgages and notes exempt as to principal and interest from federal, state, municipal and local taxes necessarily follows. We find no language in *Smith vs. Kansas City, supra*, which by implication or otherwise has any application to the issues in the case at bar. We respectfully submit that a transaction such as the purchase by the plaintiff of building materials for its farm buildings, is not analogous to the issuing of farm loan bonds secured by farm mortgages and notes, since such bonds are specifically exempted from taxation by the State. The remoteness of the relationship would prohibit the extension of tax exemption to such transactions unless specifically granted by Congress.

While Federal Land Banks are federal instrumentalities and as such exercise governmental functions, they are also authorized to and do engage in private business in competition with private citizens and corporations.

In the case of *Federal Land Bank vs. Priddy*, 295 U. S. 229, this Court, speaking through Mr. Justice Stone, now Chief Justice, said:

> "In interpreting Section 4, it is to be borne in mind that federal land banks, although concededly federal instrumentalities, possess also some of the characteristics of private business corporations. See *Federal Land*

Bank vs. Gaines, supra (290 U. S. 254, 78 L. ed. 301, 54 S. Ct. 168). The statute does not contemplate that their stock is to be wholly, or even chiefly, government owned. Its acquisition by private investors is permitted §5, and its subscription by the borrowing national farm loan association is compulsory. §5. The operations of the federal land banks are, in part at least, for profit. §5. In the conduct of their business they may enter into contracts, §4, borrow money, receive interest and fees, §13, pay the expenses and commissions of agents, §15, and pay dividends on their stock, §5. While they are required to deposit in trust farm mortgages as security for farm loan bonds, §13, they may acquire and dispose of property, in their own right, including land, §13. They thus have many of the characteristics of private business corporations, distinguishing them from the government itself and its municipal subdivisions, and from corporations wholly government owned, and created to effect an exclusively governmental purpose. This is a circumstance which gives some support to the inference that the intended scope of the liability to suit includes judicial process incident to suit. See *District of Columbia vs. Woodbury*, 136 U. S. 450, 455, 34 L. ed. 472, 474, 10 S. Ct. 990; *Clallam County vs. United States*, 263 U. S. 341, 345, 68 L. ed. 328, 331, 44 S. Ct. 121."

In the syllabus of the same case, *Federal Land Bank vs. Priddy, supra*, we find the following statement:

> "Federal land banks, though Federal instrumentalities, possess some of the characteristics of private business corporations, in that the acquisition of their stock by private investors is permitted, their operations are, in part at least, for profit, and that they may acquire and dispose of property, including land, in their own right."

The Federal Farm Loan Act provides that the banks created pursuant to its provisions, may be designated:

> "depository of the public money * * * and they may also be employed as financial agents of the Government;"

and they shall perform all said reasonable duties as depositories for public money as financial agents of the Government as may be required of them."

Section 701, 12 U. S. C. A.

In the case of *Pittman vs. Home Owners' Loan Corporation*, 308 U. S. 321, the question for decision was whether a mortgage executed by the Home Owners' Loan Corporation was subject to a tax imposed by a statute of the State of Maryland. Said statute imposed a tax "upon every instrument in writing recorded or offered for record with the Clerks of the Circuit Court of the respective counties or the Clerk of the Superior Court of Baltimore City on or after June 1st, 1937, to and including September 30th, 1939, * * * including mechanics' liens, deeds, mortgages * * *."

The tax imposed was at the rate of ten cents for each $100.00 or fractional part thereof. In addition to the tax thus imposed, the clerks were required to collect a charge of fifty cents for each instrument recorded or offered for record.

Section 4 (c) of the Home Owners' Loan Act provides that "the bonds issued by the corporation shall be exempt both as to principal and interest from all taxation, except surtaxes, estate, inheritance and gift taxes, now or hereafter imposed by the United States * * * or by any State, county, municipality or local taxing authority."

Said Act provided further:

"The Corporation, including its franchise, its capital, reserves and surplus and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

48 Stat. at L. 131, Chap. 64, 12 U. S. C. A., Sec. 1463 (c), (f).

One of the questions involved was as to the meaning of the

term, "loans." In discussing this question, Chief Justice Hughes said:

> "The critical term in the present relation is 'loans.' We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom, and the mortgages given to the Corporation as security. The Home Owners' Loan Act required that the loans made by the Corporation shall be secured by a duly recorded home mortgage."

The inference to be drawn from the foregoing statement of Chief Justice Hughes would imply that the term, "loans," includes mortgages, and under the specific provisions of Section 4, *supra*, of the Home Owners' Loan Act, mortgages would be exempt from taxation.

The tax sought to be imposed under the Maryland statute, *supra*, was in fact, a direct tax upon the mortgage taken by the Home Owners' Loan Corporation and the imposition of such tax would be in violation of said Section 4 of the Home Owners' Loan Act, which provides:

> "First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation."

Activities of Petitioner in Purchasing Lumber and Other Materials to Be Used in Repairing Buildings on Its Farms Are Not Governmental Functions.

We submit that the activities of the plaintiff, Federal Land Bank, in purchasing material to be used in repairing buildings upon its property is engaged in an activity which is not a governmental function and which distinguishes it

from the government itself, and from corporations wholly government owned and created to effect an exclusively governmental purpose.

Governmental functions must be distinguished from those which are private in their nature. We contend that when Congress enacted the Federal Farm Loan Act it was not contemplated, nor was it intended that the immunity from taxation provided therein should apply or extend to transactions such as the one in controversy in the case at bar.

This theory is supported by the decision in the case of *Federal Land Bank vs. Priddy*, 295 U. S. 229, 70 L. Ed. 408. It was therein held that federal land banks are subject to attachment and execution, at least where there will be no direct interference with any function performed by them as federal instrumentalities, in view of the provisions of the Federal Farm Loan Act permitting them to be sued "as fully as natural persons."

It was further held that the Federal Land Banks possess some of the characteristics of a private business corporation; that the remedies afforded by the Federal Farm Loan Act to their creditors are identical with those given to creditors of joint stock land banks; that Federal Land Banks pay dividends on their stock; that while they are required to deposit in trust farm loans as security for farm loan bonds, they may acquire and dispose of property in their own right, including land; that they have many of the characteristics of private business corporations, distinguishing them from the government itself and from corporations wholly government owned and created to effect an exclusively governmental purpose.

Under the principles laid down in the cases cited, the test is whether the taxes are laid on transactions involving an exertion of governmental functions and their bearing on governmental operations, and whether such taxes would have

the effect to "retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

M'Culloch vs. Maryland, 4 Wheat. 316.

Indian Motorcycle Co. vs. United States, 283 U. S. 575.

As was said by the Supreme Court of the State of North Dakota in the case from which this appeal is taken:

> "The Appellant, Federal Land Bank, is engaged in the business of loaning money to farm owners. It secured these loans by mortgages upon farms. Certain of its mortgagors defaulted. Appellant foreclosed and acquired title to the security. The land thus acquired had buildings on them. The buildings were in disrepair. Lumber was required to repair them in order to conserve the buildings and make them habitable for tenants. Appellant bought lumber to make these repairs. The State seeks to impose the sales tax here challenged—a tax which all other purchasers of lumber must pay. The appellant claims immunity from the tax on the ground that it is a federal instrumentality. If we read the case of *M'Culloch vs. Maryland, supra*, aright, that claim must be predicated on the theory that to exact the tax would constitute an interference with the operations of the federal government. There can be no ground for such a contention here. It is true that the tenuous device resorted to by Congress to clothe the federal land banks in the garb of governmental instrumentalities and thus render their bonds tax exempt was held sufficient. *Smith vs. Kansas City Title & Trust Company, supra*. And in *Federal Land Bank vs. Crosland*, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703, 29 A. L. R. 1, the exemption from taxation of the real estate mortgages taken by the banks was sustained. But it is one thing to hold the bonds of the land banks and the securities on which they are based tax exempt, and quite another to say that this tax exemption can be projected to so remote a business transaction as the purchase of lumber to repair buildings on lands acquired by the banks in an enterprise additional to rather than inci-

dental or related to the ostensible governmental purposes for which they were created. Certainly the imposition of the tax on the transaction here in question could not hinder or embarrass the performance of the governmental functions—acting as a depositary and financial agent and buying government securities the appellant was created to perform. Shadow ought not to be confused with substance. 'The rule that governmental instrumentalities are immune from taxation will not be mechanically applied regardless of the consequence to the operations of government.' *Educational Films Corporation of America vs. Ward, supra.* And we cannot believe that the mere designation of an individual or corporation as a governmental agent confers on Congress the power to absolve every transaction in which that agent may engage or the property used or acquired in those transactions from liability to taxation in the state taxing district wherein the transactions are performed or the property held."

We cannot state more clearly the fundamental proposition involved here, than it is stated in the foregoing quotation. The petitioner is engaged in the business of a competitive character. The petitioner competes with private corporations and private citizens engaged in similar business and who are subject to and must pay the sales tax from which petitioner claims that its transactions are immune. Such immunity can be successfully claimed only upon the theory that the transaction involved is an exercise of a governmental function, by the federal government, and that a tax imposed thereon would impede, obstruct and retard the government in the execution of its governmental powers. It should be noted that the transaction involved here is not a governmental function, nor can the tax sought to be imposed thereon impede, obstruct or retard the government in the discharge of its sovereign function.

That taxes will be paid out of funds owned and controlled by the petitioner is not sufficient to sustain the claim that

they are paid out of government funds. If paid, they certainly will not be paid out of federal money placed in the Federal Land Bank as a government depositary.

Clearly the business of loaning money to farmers and taking mortgages upon the farms to secure payment of such loans is not essential to enable the bank to perform functions that are governmental in their character. The immunity provided by Section 26 of the Federal Farm Loan Act which provides "that every Federal Loan Bank and every National Farm Loan Association, including the capital and reserve or surplus therein and income derived therefrom shall be exempt from Federal, State, municipal and local taxation, except taxes upon real estate * * *."

We submit it was intended to include funds and activities which were held to be instrumentalities of the government of the United States which were essential and incidental to the exercise of governmental functions. In the case of *First National Bank vs. Fellows*, 244 U. S. 146, 61 L. Ed. 1233, it was held that Congress did not exceed its powers under the United States Constitution, Article I, Section 8, Class 18, giving it power to make "all laws which shall be necessary and proper for carrying into execution" the powers expressly given by the Constitution when giving authority to the Federal Reserve Board by the Act of December 23, 1912 (38 Stat. at L. 262, Ch. 6, Compiled Statutes 1916, Section 9794 (Section 11k), to grant a special permit to national banks applying therefor when not in contravention of state or local laws, the right to act as trustees, executors, administrators or registrars of stocks and bonds under such rules and regulations as the Board may prescribe.

It appears, therefore, that the rights thus given to the national banks to act as trustees, executors, administrators, etc., were sustained on the theory that it was necessary to enable such banks to operate on an equal footing with pri-

vate corporations authorized by local laws to engage in such business.

On the question as to whether a tax imposed by a state government upon another state government or upon the federal government, the test is whether such tax obstructs the governmental operations of government upon which it is imposed. If it does, it is invalid; if it does not, it is valid.

In the case of *First National Bank vs. Commonwealth of Kentucky*, 9 Wall. 353, 19 L. Ed. 701, the Court, in discussing the proposition as to whether a tax by one government upon the activities of another, would in any way interfere with the performance of governmental functions, the Court said:

> "* * * and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. The most important agents of the Federal Government are its officers; but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. * * * The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."
>
> *First National Bank vs. Commonwealth of Kentucky*, 9 Wall. 353, 76 U. S. ..., 19 L. Ed. 701, 703.

Continuing the Court said:

> "But it is argued that the banks, being instrumentalities of the Federal Government, by which some of its important operations are conducted, cannot be subject to such state legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from that state taxation on the ground here stated, and this principle laid down in the case of *M'Culloch vs. The State of Maryland*, 4 Wheat. 316, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the states * * *. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States."

The same principle was announced in the case of *Bank of United States vs. Planters' Bank of Georgia*, 9 Wheat. 904, 6 L. Ed. 244, in an opinion written by Chief Justice Marshall:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted."

In the case of *Graves vs. New York*, 306 U. S. 465, 83 L. Ed. 927, the Court in discussing the application of immunity from taxation where the Act of Congress is silent, speaking through Mr. Justice Stone, now Chief Justice, said:

> "It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which they are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.
>
> "The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, *New York ex rel. Cohn vs. Graves*, 300 U. S. 308, 313, 314, 81 L. Ed. 666, 670, 671, 57 S. Ct. 466, 108 A. L. R. 721; *Hale vs. Iowa State Bd. of Assessment & Review*, 302 U. S. 95, 108, 82 L. Ed. 72, 80, 58 S. Ct. 102; *Helvering vs. Gerhardt*, 304 U. S. 405, 82 L. Ed. 1427, 58 S. Ct. 969, *supra*; cf. *Metcalf & Eddy vs. Mitchell*, 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172; *Fox Film Corp. vs. Doyal*, 286 U. S. 123,

76 L. Ed. 1010, 52 S. Ct. 546; *James vs. Dravo Contracting Co.*, *supra* (302 U. S. 149, 82 L. Ed. 166, 58 S. Ct. 208, 114 A. L. R. 318); *Helvering vs. Mountain Producers' Corp.*, 303 U. S. 376, 82 L. Ed. 907, 58 S. Ct. 623, and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions."

In addition to the authorities cited, we desire to call your attention to the case of *State of North Dakota vs. Olson*, 33 Federal (2d) 848, and cases therein cited.

The power of Congress to create the Federal Land Bank was sustained because of "* * * of authority to them to act for the government as depositaries of public money and purchasers of government bonds."

Again we quote from the opinion of the Court in the case of *Federal Land Bank of Saint Paul vs. Bismarck Lumber Company*, from which this appeal is taken:

> "Loaning money at interest to private enterprise is not a governmental function. The fact that a loan is made to a farmer does not distinguish it in this respect from a loan made to a butcher, a baker, or a candlestickmaker. When the land banks engage in this business, though they be governmental instrumentalities, they do not change its character. They operate in a private field for private profit in competition with private enterprise. It is true that because of congressional favor they have the advantage of an inexhaustible source from which to draw in making their loans and at a most advantageous rate of interest. But the stock of the banks is, in the main, privately owned. Indeed, it all may be owned privately. If there be dividends, the government does not participate though it own stock. Private owners of stock do participate. The banks are not banks of general deposit and discount. The business

> done by them provides no outlet for governmental securities, because, forsooth, the funds in the banks are obtained from the government itself, except in so far as their stocks and bonds are purchased and paid for by others than the government. And the theory of the Land Bank Act is that money thus derived is to be used in making the farm loans on which the bonds are based. In *Federal Land Bank vs. Priddy*, 295 U. S. 229, 55 S. Ct. 705, 79 L. Ed. 1408, the court, after analyzing the statute creating the land banks has this to say concerning them: 'They thus have many of the characteristics of private business corporations distinguishing them from the government itself and its municipal subdivisions and from corporations wholly government owned and created to effect an exclusively governmental purpose.'"

We respectfully submit that the transaction by the Federal Land Bank in purchasing lumber and other building material to repair buildings upon its farms, which farms had been acquired through mortgage foreclosure proceedings in the State of North Dakota, is not a governmental function exercised by the federal government in its sovereign capacity. It is neither necessary nor essential as such, and in that sense is not a governmental instrumentality. The sales tax imposed upon such transactions cannot be said to interfere in any way with, or impede or obstruct the United States government in the exercise and discharge of its governmental functions.

It is respectfully submitted, therefore, that the decision of the Court below should be affirmed.

ALVIN C. STRUTZ,
Attorney General.
P. O. SATHRE,
Assistant Attorney General.

October, 1941.

G. S.

SUPREME COURT OF THE UNITED STATES.

No. 76.—October Term, 1941.

The Federal Land Bank of St. Paul, Petitioner, *vs.* Bismarck Lumber Company, and John Gray, as Tax Commissioner of the State of North Dakota, Respondents. } On Writ of Certiorari to the Supreme Court of the State of North Dakota.

[November 10, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

We are asked to decide whether, in view of section 26 of the Federal Farm Loan Act of July 17, 1916 (c. 245, 39 Stat. 360, 380; 12 U. S. C. A. §§ 931-933),[1] petitioner is subject to the Sales Tax Act of North Dakota,[2] the pertinent sections of which are set forth in the margin.[3]

[1] Sec. 26. That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

[2] North Dakota Laws of 1937, c. 249.

[3] § 2. TAX IMPOSED.] There is hereby imposed, beginning the first day of May, 1937, and ending June 30th, 1939, a tax of two percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users; ..... (Laws of 1939, c. 234, Sec. 1, extends the period of the tax through June 30, 1941,

Petitioner, the Federal Land Bank of St. Paul, was created pursuant to the Federal Farm Loan Act, *supra*. In the course of its operations it acquired by foreclosure proceedings certain farm properties in Burleigh County, North Dakota.[4] To effect necessary repairs and improvements to the buildings and fences on these properties, petitioner purchased lumber and other building materials of an aggregate value of $408.26 from the Bismarck Lumber Company, a retail dealer. The Lumber Company demanded the sum of $8.02 from petitioner, representing the total amount of the state sales tax on the various purchases. This petitioner refused to pay. On March 9, 1938, petitioner filed a complaint in the District Court of Burleigh County against the Lumber Company and the State Tax Commissioner,[5] alleging the foregoing facts and praying for an adjudication of non-liability for the sales tax on the ground that petitioner is exempt under section 26 of the Federal Farm Loan Act, *supra*, and the federal Constitution. To this complaint respondents demurred. In sustaining the demurrer the trial court held that the sales to petitioner were subject to the tax, that the Lumber Company was required to collect the tax, and that petitioner was under a legal duty to pay it.

and S. B. No. 40, approved March 14, 1941, extends the tax through June 30, 1943.)

§ 3. EXEMPTIONS.] There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

§ 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

§ 7. UNLAWFUL ACTS.] It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

[4] Section 13 of the Federal Farm Loan Act (39 Stat. 366, 372) gives federal land banks the power "To acquire and dispose of . . . parcels of land acquired in satisfaction of debts or purchased at sales under judgments, decrees or mortgages held by it".

[5] Owen T. Owen was named as the original defendant. He resigned the office of Tax Commissioner on December 26, 1938. His successor, respondent Gray, who took office on May 18, 1939, was substituted by order of this Court on May 26, 1941.

Accordingly judgment was entered against petitioner in the amount of the tax. The Supreme Court of North Dakota affirmed the judgment of the trial court. *Federal Land Bank of St. Paul v. Bismarck Lumber Co. et al.*, 70 N. D. 607; 297 N. W. 42. The case is here because it presents a question of importance in the administration of the Federal Farm Loan Act.

We are confronted with two questions:

First—Does section 26 include within its ban a state sales tax such as this? We hold that it does.

Second—Can Congress constitutionally immunize from state taxation activities in furtherance of the lending functions of federal land banks? We hold that it can.

I. It is clear that the North Dakota statute makes the purchaser, petitioner here, liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part. The Supreme Court of North Dakota has held that the sales tax is laid upon the purchaser. *Jewel Tea Company* v. *State Tax Commissioner*, 70 N. D. 229; 293 N. W. 386. This holding was reaffirmed in the decision below. These determinations of the incidence of the tax by the state court are controlling, and respondents concede the point.

The unqualified term "taxation" used in section 26 clearly encompasses within its scope a sales tax such as the instant one, and this conclusion is confirmed by the structure of the section. In reaching an opposite conclusion the court below ignored the plain language, "That every Federal land bank—shall be exempt from Federal, State, municipal, and local taxation", and seized upon the phrase, "including the capital and reserve or surplus therein and the income derived therefrom", as delimiting the scope of the exemption. The protection of section 26 cannot thus be frittered away. We recently had occasion under other circumstances to point out that the term "including" is not one of all embracing definition, but connotes simply an illustrative application of the general principle. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 189; see also *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 125. If the broad exemption accorded to "every Federal land bank" were limited to the specific illustrations mentioned in the participial phrase introduced by "including", there would have been

no necessity to except from the purview of section 26 the real estate held by the land banks.

The additional exemptions granted to farm loan bonds and first mortgages executed to the land banks are proper additions to the general exemption of section 26. The bonds may be held by private persons, and, of course, the general exemption of section 26 would not extend to them. Likewise the general exemption would protect mortgages executed to the land banks and held by them, but it would not survive a transfer.

Nothing in the legislative history of section 26 commands a contrary result,[6] and a broad construction is indicated by Congress' intention to advance credit to farm borrowers at the lowest possible interest rate. The legislative history of similar exemption clauses in other statutes supports our interpretation of section 26.[7]

It cannot be seriously contended that the tax falls within the real estate exception to section 26. Obviously a tax upon the sale of building materials to be used on the real estate of a federal land bank is not a tax upon that real estate.

II. The principal argument of respondents, and the major ground of the decision below, is that Congress cannot constitutionally immunize the lending functions, or the activities incidental thereto, of federal land banks from state taxation. It runs in this

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[6] The committee reports emphasize the tax exempt character of the farm loan bonds. S. Rpt. No. 144, 64th Cong., 1st Sess., p. 7; H. Rpt. No. 630, 64th Cong., 1st Sess., p. 8; H. R. Doc. No. 494, 64th Cong., 1st Sess., p. 11. The lengthy debates in the Senate over the constitutionality of section 26 may be explainable in part on the ground that the broad exemption thereby created would deprive the States of a large source of potential revenue. See 53 Cong. Rec. 6851-6854, 6961-6970, 7245-7247, 7305-7318, 7372-7378.

[7] Most enlightening is the recent amendment (Pub. No. 108, 77th Cong., 1st Sess.) to section 10 of the Reconstruction Finance Corporation Act (47 Stat. 5, 9) which declares that exemption includes sales taxes. The committee reports make it clear that Congress sought only to confirm its original understanding of the scope of the exemption by this amendment. H. Rpt. No. 514, 77th Cong., 1st Sess., p 2; S. Rpt. No. 292, 77th Cong., 1st Sess., p. 2. See also 87 Cong. Rec. 4255-4256, 4616, 4626-4629 (pamph.).

When Congress moved to avoid the effect of our decision in Baltimore Nat. Bank v. State Tax Commission, 297 U. S. 209, that the Reconstruction Finance Corporation was taxable on its national bank shares, the committee reports explain that section 10 "was intended to give as wide immunity as possible to the functions and activities of the corporation". H. Rpt. No. 1995, 74th Cong., 2d Sess., pp 1-2; H. Rpt. No. 2199, 74th Cong., 2d Sess.; S. Rpt. No. 1545, 74th Cong., 2d Sess.

See also the committee report on the Federal Reserve Act, in which the standard exemption clause first appeared, H. Rpt. No. 69, 63d Cong., 1st Sess., p. 39, and the report on the bill creating the Federal Savings and Loan Insurance Corporation. H. Rpt. No. 1922, 73d Cong., 2d Sess., p 4.

fashion: Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositaries and fiscal agents for the federal government[8] and providing a market for government bonds;[9] all other functions of the land banks are private; petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore section 26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions.

The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477. It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activites of such corporation are governmental. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 32; *Graves* v. *New York ex rel. O'Keefe*, *supra*, 477.

The federal land banks are constitutionally created. *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale.[10] They are "instrumentalities of the federal government engaged in the performance of an important governmental function". *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231; *Federal Land Bank* v. *Gaines*, 290 U. S. 247, 254. The national farm loan associations,[11] the local cooperative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. *Knox National F. L. Asso.* v. *Phillips*, 300 U. S. 194, 202; *Federal Land Bank* v. *Gaines*, *supra*, 254.

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[8] Sec. 6, 39 Stat. 360, 365.

[9] Sec. 5, 39 Stat. 360, 364. Sec. 13, 39 Stat. 360, 372.

[10] Sec. 13, 39 Stat. 360, 372.

[11] Sec. 7, 39 Stat. 360, 365.

Congress has the power to protect the instrumentalities which it has constitutionally created. This conclusion follows naturally from the express grant of power to Congress "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, Sec. 8, par. 18." *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 33, and cases cited. We have held on three occasions that Congress has authority to prescribe tax immunity for activities connected with, or in furtherance of, the lending functions of federal credit agencies. *Smith* v. *Kansas City Title & Trust Co.*, *supra*; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Loan Corp.*, *supra*.[12] The first two of these cases dealt with the very section 26 now in issue. They are conclusive here.

In support of their argument respondents rely on *Smith* v. *Kansas City Title & Trust Co.*, *supra*, and *Federal Land Bank* v. *Priddy*, *supra*. In the *Smith* case we held that farm loan bonds, which might be secured by first mortgages accumulated in the course of the land banks' lending activities,[13] could be exempted from state taxation. In the *Priddy* case, merely as an aid to the proper construction of section 4 of the Federal Farm Loan Act giving the land banks the right to sue and be sued "as fully as natural persons", we noted that the land banks possessed some of the characteristics of private business corporations.[14] Their character as federal instrumentalities was specifically affirmed and the broad tax immunity granted to them was not questioned. Manifestly these cases do not support respondents' constitutional theories.

We cannot accede to the suggestion that the *Smith* and *Crosland* cases can be distinguished, as they were by the state court, on the ground that a sales tax upon purchases made by petitioner in furtherance of its lending functions, unlike the taxes in those cases, bears so remotely upon petitioner's functions as to be beyond the power of Congress to prohibit. We have found that the instant tax is within the scope of section 26 and that section is a valid

[12] See also Owensboro National Bank v. Owensboro, 173 U. S. 664, 667, 668; Colorado National Bank v. Bedford, 310 U. S. 41, 50, 51.

[13] Sec. 18, 39 Stat. 360, 375.

[14] See also R. F. C. v. Menihan Corp., 312 U. S. 81, 83.

enactment. It is not our function to speculate whether the immunity from one type of tax as contrasted with another is wise. That is a question solely for Congress, acting within its constitutional sphere, to determine. *Pittman* v. *Home Owners' Loan Corp.*, *supra*, 33; *Smith* v. *Kansas City Title & Trust Co.*, *supra*, 213.

Reversed.

Mr. Justice Jackson took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.